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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

PAUL M. GOETZ,

Petitioner

v.

BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY,

Respondent,

Petition For A Writ Of Certiorari To The Supreme Court of The State of Wisconsin

---

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether the First Amendment's speech and press clauses limit the power of the State to punish a lawyer who submits a letter to the editor of a newspaper, critical of an incumbent public official, based solely on the fact that the lawyer signed the letter with a pen name.

2. Whether the court below errored in upholding a flat ban on noninjurious misrepresentations of a fact by a lawyer (use of a pen name in signing a letter to the editor of a newspaper where the letter was critical of an incumbent public official), when SCHWARE v. BOARD OF BAR EXAMINERS 352 U.S. 323 (1957), held that the prior use of an alias by a bar applicant, which harmed no one, did not have a rational connection with the applicant's fitness or capacity to practice law.

3. Whether the Fifth and Fourteenth Amendment's Due Process and Equal Protection Clauses limit the power of the state to punish a lawyer for non-injurious misrepresentation of a fact (use of a pen name in connection with core political speech) when the same state court previously held that the same rule used to punish the lawyer (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation) did not apply to lawyer candidates for judicial office.

4. Whether the state can punish a lawyer for "Failure to Cooperate" with an investigation when the official comments to the State's own rules of professional conduct for attorneys plainly allowed the lawyer to do what he did, namely to refuse to comply with the investigation on a good faith challenge to the State's authority to conduct the investigation.

5. Whether the regulation of lawyer speech in advising a client about a matter of public concern that does not result in harm to the client or involve pending litigation raises fundamental and unresolved issues under the First Amendment.

a) Whether the proper standard to measure repression of

of lawyer speech on conflict of interest grounds must be a "Substantial Likelihood of Material Prejudice" test.

b) Whether regulation of lawyer speech on conflict of interest grounds under SCR 20:1.7(b) is unconstitutional both facially and as applied to this case.

6. Whether the State's interest in regulating non-speech "conduct" by lawyers, relieves the State of justifying the regulation under the 4-part inquiry from UNITED STATES V. O'BRIAN 391 U.S. 367 (1968)

7. Whether the First Amendment justifications for the allocation of the burden of proof, mandated by this Court, on regulations of pure speech as well as non-speech conduct only incidentally of pure speech, also justify imposing costs and attorney fees on would-be regulators.

LIST OF PARTIES

The two parties th the proceedings and in this court are Petitioner Paul M. Goetz, the Respondent-Appellant below, and Respondent Board of Attorneys Professional Responsibility, the enforcement agency and appellee below.

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OPINIONS BELOW

The judgement below was first entered on November 7, 1997 and reaffirmed on December 17, 1997 after a denial of a motion to reconsider. Copies of Both judgments are reprinted in the Appendix to this Petition at pages A-1 to A-9, and A-15. The findings and decision of the trial court referee are reprinted in the Appendix to this Petition at pages A-11 to A-18.

JURISDICTION

The judgement below was entered and filed on December 17, 1997 after the lower court denied a motion to reconsider. This Court has jurisdiction to issue a writ of certiorari under 28 U.S.C. sec. 1257, because petitioner raised and preserved, and the highest court of the state rejected those constitutional claims.

CONSTITUTIONAL PROVISIONS AT ISSUE

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment or a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of live or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property be taken for public use without just compensation.

AMENDMENT XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS OF THE WISCONSIN SUPREME COURT RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT ISSUE

SCR 20:8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

f) violate a statute, supreme court rule, supreme court order, or supreme court decision regulating the conduct of lawyers, or

g) violate the attorney's oath.

The OFFICIAL COMMENT to SCR 20:8.4 provides in pertinent part:

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

The SCOPE note to the Rules of Professional Conduct for Attorneys provides in pertinent part:

The Rules of Professional Conduct are rules of reasons. They should be interpreted with reference to the purpose of legal representation and of the law itself. Some of the rules are imperatives, cast in terms "shall" or "shall nor." these define proper conduct for purposes of professional discipline.Others, generally cast in the term "may" are permissive and and define areas under the rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer exercises such discretion. Other rules define the nature of relationships between the lawyer and and others. These rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should." COMMENTS DO NOT ADD OBLIGATIONS TO the rules BUT PROVIDE GUIDANCE FOR PRACTICING IN COMPLIANCE WITH THE RULES. (emphasis supplied).

The SCOPE note is followed by list of definitions under a section titled TERMINOLOGY and includes the following"

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of RELEVANT information. (emphasis supplied).

SCR 20:1.2(d) provides:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct and may counsel or assist a client to make a good faith effort to determine the validity scope, meaning or application of the law.

The official COMMENT to SCR 20:1.2(d) provides in part:

"...The last clause of paragraph (d) recognizes that in determining the validity or interpretation of a statue or regula- may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

SCR 20:8.1 provides in part:

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

b) fail to disclose a fact necessary to correct a misrepresentation known by the person to have arisen in the matter, or knowingly fail to respond to a LAWFUL DEMAND for information from an admission or disciplinary authority...(emphasis mine).

SCR 21.03(4) and (5) provide:

4) Every attorney shall cooperate with the board and the administrator in the investigation, prosecution and disposition of grievances and complaints filed with or by the board or administrator.

5) Discipline for misconduct is NOT INTENDED AS PUNISHMENT for wrongdoing BUT IS FOR THE PROTECTION OF THE PUBLIC, the Courts and the Legal Profession. The fact that certain misconduct has remained unchallenged if done by other persons or when done at other times or the fact that the misconduct has not been made the subject of disciplinary proceedings earlier is not an excuse for additional misconduct by an attorney. (emphasis supplies).

SCR 22.07 is entitled INVESTIGATION, and provides in part:

3) the administrator or committee may compel the respondent to answer questions, furnish documents and present any information DEEMED RELEVANT to the investigation. FAILURE of the respondent TO ANSWER QUESTIONS IS MISCONDUCT. The administrator or committee may compel another person to produce

pertinent books, papers and documents under Rule 22.22. (emphasis supplied).

The official COMMENT to SCR 22.07 provides, in part:

In Subsection (3), the administrator and the committee have the power to compel the attendance of attorneys and witnesses at investigatory meetings, Attorneys will not be subpoenaed, but the notice to attend will advise the attorney that failure to attend is grounds for discipline. The section reflects the importance of obtaining a prompt comprehensive answer from the respondent. Failure to obtain the answer promptly ADDS TO THE DELAY which has CAUSED DISSATISFACTION with the present system and WASTES THE TIME of staff investigators. This increases the costs of administration and demoralizes the volunteer committee members who serve without pay. (emphasis supplied).

SCR 20:1.7 is entitled CONFLICT OF INTEREST and provides in part:

b) A lawyer shall not represent a client if the representation MAY BE MATERIALLY LIMITED by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

1) the lawyer reasonably believes the representation will not be adversely affected; and

2) the client consents in writing after consultation. When representation of multiple clients is a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved. (emphasis supplied).

The official COMMENT to SCR 20:1.7 provides in part:

LOYALTY TO CLIENT

Loyalty is an essential element in the lawyer's relationship to a client...

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out a APPROPRIATE course of action for the client because of the lawyer's other responsibilities or interests. the conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict conflict does not itself preclude representation. THE CRITICAL QUESTIONS are THE

LIKELIHOOD that a conflict will eventuate and, if it does, whether it will MATERIALLY INTERFERE with the lawyer's independent professional judgement in considering alternatives or forecloses courses of action that reasonably should be given to whether the client wished to accommodate the other interest involved. (emphasis mine).

LAWYER'S INTERESTS

The lawyer's own interest should not be permitted to have an ADVERSE EFFECT on representation of a client. (emphasis mine).

SCR 40:15 is the ATTORNEY"S OATH and provides in part:

I will support the constitution of the United States and the constitution of the State of Wisconsin.

I Will abstain from offensive personality and advance no no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged.

SCR 22.20 is entitled ASSESSMENT OF COSTS and provides in part:

1) The supreme court may access all or part of the costs of the proceeding against the respondent and enter a judgment for costs. The board may assess all or part of the costs of a proceeding in which the board imposes discipline pursuant to SCR 21:09(2). Costs are payable to the board.

WISCONSIN STATUTES AT ISSUE

Section 946.12 Wisconsin Statutes is entitled MISCONDUCT IN PUBLIC OFFICE and provides:

946.12 MISCONDUCT IN PUBLIC OFFICE. Any public officer or public employee who does any of the following is guilty of a Class E felony:

2) In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority pr which the officer of employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity;

STATEMENT OF CASE

1. Nature of the Case.

This appeal of an attorney discipline case involves three claims arising out of Attorney Goetz's publication of a letter to the editor of the Wausau Daily Herald on December 11, 1991, criticizing then incumbent Lincoln County District Attorney Johnson for minimizing a public reprimand he had received for professional misconduct, and the events following that publication. The First Claim alleged a violation of SCR 20:8.4(c) related to Goetz's use of a pen name in the letter to the editor. The Second Claim, alleged a conflict of interest violation under SCR 20:1.7(b), rises out of Goetz's response to requests by the County Sheriff's civil attorney (the County Corporation Counsel), for information about the status of a sheriff's department investigative file into a noncriminal matter and the fact that the information Goetz supplied to the Corporation Counsel supported the position that Open Records requests, served on the Sheriff seeking access to a Sheriff's department investigation into the source of three anonymous letters mailed to Johnson in 1992, should be denied. That position was consistent with Goetz's self-interest, but was based on pre-existing office policies, and was not adverse to any of client interest. The Third Claim alleged Goetz failed to cooperate with an investigation into possible professional misconduct (in violation of SCR 21.03(4) and SCR 22.07(3)) by virtue for Goetz's refusal to respond to the respondent's District Committee's questions concerning the three letters mailed to Johnson in 1992 and which were the subject of a noncriminal investigation of the sferiff's department, and which were the subject of the Open Records requests.

2. Procedural Status.

After the board filed a formal disciplinary complaint in court, Goetz moved to dismiss for failure to state claims for relief. By an August 21, 1996 order, the trial court Referee denied the motion to dismiss and ordered Goetz to file an answer. Instead of answering, on September 10, 1996 Goetz moved for summary judgment, to reconsider and to quash discovery. By a September 25, 1996 order, the Referee denied the motion to reconsider and quash discovery, deferred consideration of the summary judgement motion, and again ordered Goetz to answer. On October 21, 1996, the Referee issued a Decision and Order granting judgement on the pleadings in favor of

the respondent board on the first claim. On the basis of stipulated facts and exhibits, and the testimony aduced at a December 23, 1996 evidentiary hearing, the Referee resolved the second and third claims adversely to Goetz. On appeal, the Wisconsin Supreme Court upheld the Referee's decision on November 7, 1997, including a public reprimand of Goetz for professional misconduct. On December 17, 1997, the Wisconsin Supreme Court denied Goetz's Motion to Reconsider. The lower court had also granted a money judgement against Goetz for the respondent's actual costs and attorney fees in the amount of $16,168.37 and an additional $50.00 costs on the motion to reconsider. Goetz was further ordered to pay the judgment or face suspension of his license to practice law 60 days after the December 17,1997 order denying his motion to reconsider. The federal questions sought to be reviewed were raised at every stage of the lower court proceedings.

STATEMENT OF FACTS

On December 11, 1991 the Wausau Daily Herald published a letter to the editor which criticized then incumbent Lincoln County District Attorney Johnson for minimizing a public reprimand he received for professional misconduct. Goetz had used a pen name when he submitted the letter to the editor because he had a private practice with clients who had to deal with the incumbent District Attorney.

Sometime in the spring of 1992 Goetz decided to run for Lincoln County District Attorney; his opponent was Johnson. During the 1992 campaign Johnson received three anonymous letters which might be classified as rude, caustic, offensive and disagreeable. (Appendix pages A-19 to A-22). After he received to first two letters, Johnson "asked" the Sheriff's department to investigate the source of the letters. Johnson suspected that Goetz or his campaign may have been the source. This was a criminal investigation into a noncriminal matter.

The Wisconsin Crime lab did not have the facilities to offer an opinion on typewriter comparison. Ultimately, The FBI was asked to investigate; it reported that the three suspect letters had impressions with the same typewriting source as samples that were known to

have come from Goetz's office.

Upon learning of this information, Sheriff Woodward sent the entire investigative file to the State Attorney General's office for review and advice. The Attorney General's office advised the Sheriff that it did "not see anything further that needs to be done from an investigative standpoint," and that "the matter is not something that we would consider forwarding to a special prosecutor." Sheriff Woodward than told Det/Sgt. Hirte to "close and seal" the investigative file on the basis that the complaint (against Goetz) lacked prosecutive merit. That was in December 1993.

On March 2, 1994, former District Attorney Jonson served Sheriff Woodward with a written request under Wisconsin Open Records law asking that he be provided with a "Complete copy of the Sheriff's department file" concerning this investigation into this noncriminal matter. Thereafter the Sheriff showed Goetz a copy of Det/Sgt Hirte's written report and the letter he received from the Attorney General's office. See Appendix pages A-23 to A-25 and A-22). The Sheriff also advised Goetz of the open records demand and verbally advised Goetz of the contents of the three letters mailed to Johnson.

Goetz offered the Sheriff his opinion that the Sheriff did not have to honor Johnson's open records request, but, in the same breath, told the Sheriff he would have to seek advice from the County Corporation Counsel; the fact that Goetz had been the target of the investigation would give the appearance of a conflict of interest. Johnson subsequently served the Sheriff with a second public records demand on March 29, 1994 and on April 4, 1994 the Sheriff went to Corporation Counsel Bergstrom for advice on how to respond to the public records demands.

On April 18, 1994 the Wausau Daily Herald served the Sheriff with yet another open records demand for access to this same criminal investigative file into a noncriminal matter. The Corporation Counsel, despite being fully aware of Goetz's "tainted" status, solicited information and advice from Goetz and the District Attorney's office as to the status of the file. It had been the office policy during Goetz's administration, and as far a Goetz knew, the policy or the District Attorney's office for at least 10 years prior to the Goetz administration, not to honor public records on closed

investigative files where no one was charged and where no one was likely to be charged. That was the status of the file when the Sheriff was served with the first open records demand. It was the further policy of the District Attorney's office during the Goetz administration (and as far as Goetz knew for at least 10 years prior to his administration), not to honor open records demands while a file was still "open" in the prosecutor's office while being reviewed for possible prosecution.

When solicited by the Corporation counsel for information on the Status of the file in the District Attorney's office, Goetz and the District attorney's office took the position that the file should be considered an "open" file in the prosecutor's office while it was being reviewed for possible prosecution of Johnson for Misconduct in Public Office, in violation of Sec 964.12(2) Wis. Stats. for "asking" the Sheriff's department to conduct a criminal investigation into a noncriminal matter. It was Goetz's opinion that a change in the status of the file from"closed where no one was charged and where no one was likely to be charged" (which is how the Sheriff viewed the file after receiving advice from the Attorney General's office), to a new status of "open" in a prosecutor's office should not have changed the posture the Sheriff should have taken in response to the open records demands. Either way, he should have declined to honor the open records demands.

The investigative file was ultimately referred to a special prosecutor for further review. Unfortunately, this review was not completed until after the Corporation Counsel wrongfully advised the Sheriff to honor the open records demands by Johnson and the Wausau Daily Herald. Once it had access to the file, the Herald began a relentless campaign against Goetz which included reporting that Goetz tried to coverup his "crime", that Goetz was sleazy for having mailed the three disputed letters to Johnson; dispute the fact that the sheriff's report was inconclusive as to who was responsible for the letters. (See Appendix pages A-27 to A-35 for a copy of a June 7, 1995 Goetz letter to the District Committee's lead investigator, Attorney Paul Payant, which recalls how th media went totally out of control in attacking Goetz as a result of its unfounded conclusions that Goetz was a criminal and a sleazy individual).

After the respondent started an ethics inquiry, Goetz denied

having any part of or knowledge of the three letters mailed to Johnson in 1992; first to the respondent's staff investigator and then to the District Committee's lead investigator, Attorney Paul Payant. Goetz's letter of June 7, 1995 to Payant, supra., advised Payant that he would like to see all three charges being investigated dismissed on the law rather than on the facts because a finding of a lack of evidence would do little to "unring all the bells" that had been rung by the media or help him regain the loss of his personal and professional reputation that occurred after the public records demand to the Wausau Daily Herald was honored.

Goetz continued to take that position when he met with the District Committee on August 11, 1995. Although he had fully cooperated with the respondent board up to that point, he refused to answer the respondent's questions about the three letters yet a third time; he believed the attorneys for the respondent were acting in violation of their oaths to support the federal constitution. Goetz also raised specific objections, citing DISCIPLINARY PROCEEDINGS AGAINST BEAVER 152 Wis. 2d 141 (1994) which, by implication recognized the 4-part test of UNITED STATES v. O'BRIAN 391 U.S. 367 (1968). Goetz also cited MCINTYRE v. OHIO ELECTIONS COMM'N 115 S.Ct. 1511 (1995). The committee then adjourned proceedings on the Goetz file until November 10, 1995. The trial court Referee held that Goetz had a bona fide reason for not appearing at the November Committee meeting but found him guilty of professional misconduct for "Failure to Cooperate" because of his failure to answer the respondent's questions about the three disputed letters at its August 11, 1995 District Committee meeting.

REASONS FOR GRANTING THE WRIT

INTRODUCTION – FIRST CLAIM

The Wisconsin Supreme Court upheld a broad prophylactic rule that imposed a flat ban on "Conduct" by by lawyers "involving dishonesty, fraud, deceit, or misrepresentation." See SCR 20:8.4 (c). The lower court allowed the broad sweep of this categorical rule to include a flat ban on the use of pen name by a lawyer in connection with a letter to the editor of a newspaper in which the letter was critical of an incumbent public official. The lower court held that there was nothing wrong with the text of the letter. Rather it found

professional misconduct to have occurred by virtue of Goetz's misrepresentation of his identity as a lawyer "thereby reflecting adversely on Attorney Goetz's PROFESSIONAL REPUTATION." (emphasis supplied). The lower court did not offer any explanation, nor was there any evidence in the record to support the hypothesis that Goetz's use of a pen name reflected adversely on his reputation, personal or professional. Likewise, there was no explanation, nor was there any record evidence that the state's desire that attorneys maintain their "dignity" and "professional reputation" in their communications with the public, on matters of public concern, is a state interest substantial enough to justify the abridgement of a lawyer's First Amendment rights. The lower court decision on this issue raises extremely important First Amendment issues. It also contradicts McINTYRE v. OHIO ELECTIONS COMM'N S.Ct. 11511 (1995). As a consequence, this petition should be granted, or, alternatively, the lower court decision should be summarily reversed.

I. The First Amendment's Speech and Press Clauses Limit The Power of the State To Punish A Lawyer Who Submits A Letter to the Editor of A Newspaper Critical of A Public Official Based Solely On The Fact That He Signed The Letter With A Pen Name.

This issue was resolved by the court in McINTYRE v. OHIO ELECTIONS COMM'N 115 S.Ct. 1511 (1995). McINTYRE found that an Ohio statute which burdened core political speech by requiring all election related documents to be signed by the author's and or sponsor's true name, banning anonymous political documents, violated the First Amendment guarantees of Free Speech. McINTYRE also noted that when a law burdens core political speech the restriction would be upheld only if it is narrowly tailored to serve an overriding state interest.

The Wisconsin court made a point of the fact that Goetz's use of a "false name" was more than an attempt to remain anonymous in criticizing a public official; rather it was a purposeful deception. It held that Goetz could have remained anonymous by using the name "ANONYMOUS" or by using his own name but (unanimously) asking the paper not to publish his name. It did not explain how the election to select one speech content was harmful to the public and the other was not.

Goetz argued that McINTYRE used the term "anonymity" synonymously with the terms "assumed names", "fictitious names" and "pseudonyms." Respondent argued that McINTYRE's reference to these other terms in our literary and political history was mere dicta. Ohio's BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in McINTYRE settles this issue. Ohio's Attorney General made much of the point, on behalf of the Ohio Elections Commission, that Mrs. McIntyre had signed her pamphlet as coming from a group which she designated as "Concerned Parents and Taxpayers" as more than mere anonymity; rather it showed her intent to "mislead" the voters as to the source of the information. The said BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI made the following point at pages 2 and 3:

> Pursuant to the transcript from the administrative hearing before the Ohio Elections Commission ("OEC"), the following exchange occurred between McIntyre and Michael Igoe, a member of the OEC:
>
> > Mcintyre:...I was working as an individual citizen, not a committee, not as a group; therefore, I didn't need to file anything.
> >
> > Igoe:...Except you didn't identify yourself as an individual; you identified yourself as a group.
>
> This dialogue demonstrates that there was evidence before the OEC to support the conclusion that McIntyre, by identifying as the circulators of her literature "Concerned Parents and Taxpayers," attempted to mislead voters as to the source of the information. Unfortunately, the order issued by the OEC finding that McIntyre violated Ohio Rev. Code section 3559.09(A) is silent as to the basis for the OEC's finding.

The opinion of the Court in McINTYRE did not contain any discussion that would indicate that Mrs. McIntyre was a litigant who gained standing to challenge the Ohio statute under the over breadth doctrine, benefiting from the Ohio statute's application to someone else.. That fact, coupled with the fact that she had identified herself

as the fictitious "Concerned Parents and Taxpayers" indicates that McINTYRE considered the use of pseudonyms as just another form of anonymity. Thus the State can no more compel speech that requires that a citizen not use a "false name" in connection with otherwise fully protected speech than it can compel a citizen to use his true name in that context.

Even if the use of a pen name by a lawyer, in some circumstances is not entitled to the same level off scrutiny as fully protected expression it would not retain that character when it is inextricably intertwined with otherwise fully protected speech. This point was made by RILEY v. NATIONAL FEDERATION OF BLIND 487 U.S. 781,786 (1998). RILEY also held:

> "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what NOT to say.
>
> The constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression was established in MIAMI HERALD PUBLISHING CO. v. TORNILLO, supra.
>
> ...[t]he right to speak and the right to refrain from speak- are complementary components of the broader concept of 'individual freedom of mind,' as illustrated in TORNILLO. (other citations omitted).
>
> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact'; either form of compulsion burdens protected speech."

The Wisconsin court found no fault with the text of the letter to the editor submitted by Goetz; it was his undisputed right to criticize public men and measures. See HUSTLER MAGAZINE INC. v. FALWELL 485 U.S. 51 (1987). The text of the letter wa fully protected expression. The pen name could not exist in a vacuum. the pen name would have been meaningless if Goetz submitted it to the newspaper on a blank page; it was "inextricably intertwined" with the fully protected text. Therefore, even if the State had a compelling

state interest in prohibiting the use of a pen name in the circumstances of this case, the strict scrutiny mandated by the First Amendment would require a narrowly tailored rule focusing on negative and real secondary effects, a broad prophylactic rule is unacceptable.

This board prophylactic rule which imposes a flat ban on lawyer "conduct" (SPEECH) "involving dishonesty, fraud, deceit, or misrepresentation" is a content-based regulation of speech and presumptively invalid; even if were limited to expressive conduct. See R.A.V. v. CITY OF ST. PAUL MINNESOTA 505 U.S. 112 (1992). Only content-neutral speech restriction are constitutionally permissible. RENTON v. PLAYTIME THEATERS INC. 475 U.S. 41 (1986) described "content-neutral" restrictions as those that are justified without reference to the content of regulated speech." BOOS v. BARRY 485 U.S. 312 (11988) held that regulations that focus on the direct impact of speech on its audience are not content neutral. "Listener's reactions to speech are not the type of 'secondary-effects' we referred to in RENTON." Regulation of speech may not be justified on the basis of content of speech and the direct impact that speech has on its listeners. The emotive impact of speech is not a "secondary-effect." regulation of speech due to its potential primary impact must be considered content-based (BOOS v. BARRY). An otherwise content-based restriction on speech can be recast as "content-neutral" if the restriction aims as negative secondary-effects. This RENTON analysis applies to political speech (Boos v.. BARRY).

The State may for the most part impose such restrictions on the practice of the professions as it may find necessary to the protection of the public. Constitutional rights, however, may not be abridged by regulations which have no reasonable relation to some purpose within the competency of the State. See PIERCE v. SOCIETY OF SISTERS OF THE HOLY NAMES OF JESUS AND MARY 268 U.S. 510 (1925).

"Lawyers also enjoy first class citizenship." SPEVACK v. KLEIN 385 U.S. 511 (1967), and as such enjoy equal protection "Government Censorship can no more be reconciled with our national standard of freedom of speech and press when done in the guise of determining 'moral character' than if it should be attempted

directly." KONIGSBERG v. STATE BAR OF CALIFORNIA 353 U.S. 252 (1957). Goetz's admission to the use of pen name in connection with the letter to the editor does not support a finding of professional misconduct. Due process sets limits on power of government to make proof of one fact evidence of the existence of the ultimate fact upon which guilt is predicated.

> "A statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of a lack of common connection between the two in common experience." See TOT v. UNITED STATES 319 U.S. 463 (1943).

Goetz submits that the kind of trivial falsehood represented by the pen name in otherwise fully protected speech has no more connection with being dishonest in his professional dealings then inventing a headache to get out of boring party without hurting someone's feelings.

Even if the use of a pen name in connection with the fully protected letter to the editor "reflected adversely on his professional reputation as a lawyer", this is not a substantial enough interest to justify the abridgment of Goetz's First Amendment rights. ZAUDERER v. OFFICE OF DISCIPLINARY COUNSEL 471 U.S. 626 (1985) observed:

> "Although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorney's maintain their substantial enough interest to justify abridgement of their First Amendment rights. Even if it were the case, we are unpursuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule. 471 U.S. at 648.

LANDMARK COMMUNICATIONS v. VIRGINIA 435 U.S. 829 (1978) also spoke to the issue of free speech and the State's interest in preserving official reputations when it held:

> "Admittedly, the Commonwealth has an interest in protecting repute of its judges, like that of all other

public officials. Our prior cases have firmly established however that injury to official reputation is insufficient reason for repressing speech that would otherwise be free. NEW YORK TIMES INC. v. SULLIVAN 376 U.S. at 272-273, 84 S.Ct. at 722, See also GARRISON v. LOUISIANA 379 U.S. 64, 67, 85 S.Ct. 209, 212, 13 L.Ed. 2d 125 (1964). The remaining interest sought to be protected, the institutional reputation of the courts is entitled to no greater weight on constitutional scales. NEW YORK TIMES. v. SULLIVAN, supra.....

"Mr. Justice Frankfurter, in his dissent in BRIDGES, agreed that speech cannot be punished when the purpose is simply 'to protect the court as a mystical entity or judges individually or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed.' Id 314 U.S. at 291-292, 62 S.Ct. at 208.

This Court has rejected categorical rules that assume harm to the process in the free speech area. This is reflected in LANDMARK, supra. (legislation finding of clear and present danger is no substitute for individual finding). Florida's categorical rule against witness disclosure of his own grand jury testimony was likewise held invalid in BUTTERWORTH v. SMITH 110 S.Ct. 1376 (1990). Even in the field of commercial speech, the Court has cautioned against substituting rules for reasons. SHAPERO v. STATE BAR OF KENTUCKY 486 U.S. 466 (1988) (categorical rule on solicitation). Especially where, as here, no actual harm occurred as a result of Goetz's pen name, wooden adherence to categorical regulations of attorney speech imposes an unnecessary abridgement on speech. Indeed, Goetz must continue his practice ever vigilant that future violations could result in harsher sanctions than a public reprimand.

II. A Flat Ban On A Non-Injurious Misrepresentation of A Fact (Use Of A Pen Name In A Letter To The Editor Of A Newspaper), Conflicts With The Holding of SCHWARE v. BOARD OF BAR EXAMINERS 352 U.S. 323 (1957).

SCHWARE v. BOARD OF BAR EXAMINERS OF NEW MEXICO, supra., involved a bar applicant who was denied the right

to take the bar examination because he had used aliases in the 1930's to forestall anti-Jewish prejudice against him. There was no question that his intent was to deceive people with his "lies." SCHWARE held that while a State can require high standards of qualification before a person can be admitted to the bar, such as good moral character or proficiency in its laws, any qualification must have a RATIONAL CONNECTION with the applicant's fitness or capacity to practice law. Mr. Schware did not use his aliases to cheat or defraud anyone; therefore the State could not deny him the opportunity to qualify for the practice of law on the grounds that his use of aliases showed a lack o good moral character. Excluding Mr. Schware from the practice of law, because of his use of aliases, which harmed no one, was held to violate due process and equal protection. This logic should apply equally to attorney disciplinary proceedings.

III. The Fifth and Fourteenth Amendment's Due Process And Equal Protection Clauses Limit The Power Of The State To Punish A Lawyer For A Non-Injurious Misrepresentation Of A Fact (Use Of A Pen Name In Connection With Core Political Speech), When The Same State Court Preciously Held that The Same Rule Used To Punish The Lawyer (Prohibiting Conduct Involving Dishonesty, Fraud, Deceit, Or Misrepresentation) Did Not Apply To Lawyer Candidates For Judicial Office.

DISCIPLINARY PROCEEDINGS AGAINST LIEDER 447 N.W. 2d 652 (1989) involved a disciplinary complaint against an attorney candidate for judicial office who, in his campaign against the incumbent Judge, was found to have made conscious and material omissions (half-truths) about his election opponent. As a result the trial court Referee found Attorney Lieder to have violated the rule of conduct that prohibited lawyers from engaging in "conduct" involving "dishonesty, fraud, deceit, or misrepresentation." On appeal, the Wisconsin Supreme Court held that that rule of "conduct" did not apply to lawyer candidates for judicial office.

In the case at bar, Goetz had argued that LIEDER was precedent that SCR 20:8.4(c) does not apply to prohibit him from using a pen name in connection with otherwise fully protected speech. Equal protection requires strict scrutiny of a classification when it

impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. See MASSACHUSETTS BOARD OF RETIREMENT v. MURGIA 427 U.S. 307, 312 (1976). Limiting the scope of LIEDER so as not to give the same protection as lawyer candidates for judicial office interferes with the exercise of fundamental rights of all lawyers to speak freely on matters of public concern.

SECOND CLAIM – FAILURE TO COOPERATE

IV. The State Can Not Punish A Lawyer For "Failure to Cooperate" With An Investigation When The Official Comments To The State's Rules of Professional Conduct For Lawyers Plainly Allowed The Lawyer To Do What He Did, Namely To Refuse To Comply With The Investigation On A Good Faith Challenge To The State's Authority To Conduct The Investigation.

Government's authority to conduct an investigation and gather data is dependent on whether the information will be useful to its official function. WATKINS v. UNITED STATES 354 U.S. 173 (1957). Respondent's attempt to determine what link, if any, Goetz may have had to the three "campaign letters" anonymously mailed to his 1992 election opponent depended on whether the establishment of a clear and convincing link to Goetz would have given rise to additional claims of professional misconduct. Goetz was aware of two categories of additional potential claims of misconduct related to this disputed letters. SCR 40:15 (the Attorney's Oath), required that all attorneys abstain from "Offensive Personality" and SCR 20:8.4(c) prohibits attorneys from engaging in "conduct" involving "dishonesty, fraud, deceit, or misrepresentation. The potential additional claims under SCR 20:8.4(c) related to the fact that the three letters mailed to Johnson in1992 were signed with pen names.

Goetz argued that even if a clear and convincing link could be established between him and the three disputed letters, that would not have given rise to a good faith prosecution for "offensive personality". DISCIPLINARY PROCEEDINGS AGAINST BEAVER 181 Wis 2d 12 (1994) limited the application of the "offensive personality" provision so that it would not infringe on First Amendment guarantees, In discussing the application of the

provision, BEAVER noted for prior cases going back to 1968:

> "The 'offensive personality' in all of these cases concerned an attorney's conduct in the course of the practice of the profession or in circumstances that led to a criminal conviction. Thus the Court has limited the scope and application of the 'offensive personality' provision of the attorney's oath, and it does not reach a substantial amount of constitutionally protected speech or significantly inhibit an attorney's right of free speech."

This was a recognition that the offensive personality" prohibition may not be used to punish pure speech based on "offensive" content; rather the prohibition applies only to non-speech conduct so that its application will only incidentally impact on speech. This was an implicit recognition that such a regulation must be judged by the 4-part inquiry described in UNITED STATES v. O'BRIAN 391 U.S. 367 (1968).

The State cannot punish any citizen for the offensive content of speech like that contained in the three letters some one mailed to Goetz's 1992 election opponent. (See HUSTLER MAGAZINE INC> v. FALWELL 485 U.S. 46 (1988) and GARRISON v. LOUISIANA 379 U.S. 64 (1964)). GARRISON held that the First Amendment protects words spoken or published about public officials with intent to harm unless the publisher intends to harm by publishing a falsehood ABOUT the public official. NEW YORK TIMES INC. v. SULLIVAN 376 U.S. 254, 273 (1964) noted that public officials must be "men of fortitude, able to thrive in a hardy environment." Since the three letters were not coupled with non-speech conduct, they were fully protected speech, addressed to a public official on matters of public concern. "The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern." RANKIN v. MCPHERSON 483 U.S. 378 (1987). Since the text of the three letters was fully protected speech, any potential claims under SCR 20:8.4(c) for the author(s) use of pen names would also have failed.

A third category of potential additional misconduct claims at the time of Goetz's "Failure to Cooperate" might have related to defamation. Respondent could not use that as supporting a need to

attempt to gather data against Goetz because there is nothing in the record to support a claim that the content of the three letters were false or provably false or that they contained anything more than opinion and rhetorical hyperbole.

There is nothing in the record to support an argument by the respondent that the recipient of the three letters, Johnson, was "captive" whiten the meaning noted in BOLGER v. YOUNG DRUG PRODUCTS CORP. 463 U.S. 60 (1983) and could not have avoided the letters with the "short, though regular journey from the mail box to the trash can...." which is an acceptable burden as far as the Constitution is concerned. The bottom line is respondent had no useful purpose for the information it sought.

Additionally, the "OFFICIAL COMMENT" to SCR 20:8.4 "plainly allowed Goetz to do what he did, i.e. refuse to comply with the Supreme Court rules requiring him to "cooperate"with the respondent's investigation into possible attorney misconduct. (See SCR 21.03(4) and (5) and SCR 22.07). The above Comment allowed Goetz to make a good faith challenge to the "validity, scope, meaning, and application of the law" including challenges to the legal regulation of the practice of law. There is no record evidence of a lack of good faith in Goetz's challenge to the respondent's need to continue to ask him questions about the three disputed letters that were asked and answered twice before. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." BORDENKIRCHER v. HAYES 434 U.S. 357 (1978) and the cases cited therein.

The "Failure to Cooperate" issue raised in the case at bar is analogous to the circumstances of HOUSTON v. HILL 482 U.S. 451 (1987) where it was held:

> "The freedom of individuals to challenge or oppose police action without thereby risking arrest is one of principal characteristics by which we distinguish a free nation from a police state."

The sentiments expressed in INS v. CHADHA 462 U.S. 919 (1983) are also pertinent:

> "[t]he fact that a procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.

> Convenience and efficiency are not the primary objectives – or hallmarks – of democratic government....

HOUCHINS v. KQED INC. 438 U.S. 1, 13 (1978) observed:

> "We must not confuse what is 'good' 'desirable' or 'expedient' with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication."

HILL, CHADHA, and HOUCHINS are offered in reply to the Comments to SCR 22.07(3) which emphasizes efficiency and convenience to the respondent and only the respondent has standing to determine and or argue the scope of respondent's investigative authority.

The present system denied Goetz his right to TIMELY and MEANINGFUL due process; there is no procedure in place to allow him to have a hearing before a neutral and detached magistrate to determine if his refusal to answer questions should be sustained, or if not, be charged with a separate offense of "failure to cooperate" only if he persists in his refusal to cooperate.

The lower court decision on the "Failure to Cooperate" claim presents extremely important First and Fifth Amendment issues. It also contradicts the decisions of the Court. Accordingly, the petition should be granted or, alternatively, the decision below summarily dismissed.

THIRD CLAIM – CONFLICT OF INTEREST

V. INTRODUCTION – Regulation of Lawyer Speech In Advising A Client About A Matter Of Public Concern That Does Not Result In Harm To A Client Or Involve Pending Litigation Raises Fundamental And Unresolved Issues Under The First Amendment.

This case involves lawyer speech/advise to a client about a matter of public concern, which at the time, related to open records demands by a former public official and a newspaper. The regulation in question, SCR 20:1.7(b), prohibited lawyers from advising clients when the advice "May Be Materially Limited" by the lawyer's self interest. The broad sweep of the rule included situations where the lawyer's self interest was merely coincidental and not adverse to client interest. The rule did not focus its aim at negative secondary

effects. It squarely presents a fundamental issue on how courts are to resolve potential conflicts between lawyers' rights of free speech in advising their clients and the State's strong, but less than fundamental constitutional interest in regulating the legal profession so as insure attorney loyalty to their clients.

This court has never directly addressed whether the First amendment places limits on the regulation or punishment of attorneys for speech/advice to clients and the appropriate standard in measuring potential conflicts of interest. The court nevertheless constitutionalized the law of lawyers advertising, overturning various state bar and supreme court ethical decisions. E.g. SHAPERO v. KENTUCKY BAR ASSOC. 486 U.S 466 (1988), ZAUDERER supra.; Re R.M.J., 455 U.S. 191 (1982); Re PRIMUS 436 U.S. 412 (1978). Earlier, in NAACP v. BUTTON 371 U.S. 415 (1963), this Court observed that 'a State cannot foreclose the exercise of constitutional rights by mere labels." Thus the protection of the First Amendment extends to any theories of liability which might result in the suppression of free speech. In NEW YORK TIMES, supra., this Court stated:

> "We are compelled neither by precedent nor policy to give more weight to the epithet 'libel' than we have to other 'mere labels' of state law."

Whenever the formulae for repression of expression has been challenged, it must be measured by STANDARDS that satisfy the First Amendment.

GENTILE v. STATE BAR OF NEVADA 111 S.Ct. 2720 (1991) addressed the PROPER STANDARD to be applied in regulating lawyer speech about pending litigation. GENTILE, unlike the case at bar involved TWO competing constitutional interests. In the case at bar the two competing interests are lawyers' rights of free speech, and the State's strong, but lesser nonconstitutional interest in assuring attorney loyalty to clients in matters that DO NOT involve pending litigation. GENTILE held that a state rule limiting lawyer speech that is otherwise entitled to full constitutional protection "requires an assessment of proximity and degree of harm." The rule need not use the highly demanding "clear and present danger" standard or the far less demanding standard established for the regulation of the rest. The proper balance, under GENTILE, when the First Amendment

right of lawyer speech competes with ANOTHER Constitutional right is the "Substantial Likelihood of Material Prejudice" standard.

V. a) The Proper Standard To Measure Repression of Lawyer Speech On Conflict Of Interest Grounds Must Be "A Substantial Likelihood Of Material Prejudice" Test.

In the case at bar, the claim of "Conflict of Interest" arose out of a "matter of public concern" and therefore was fully protected by the First Amendment. (See e.g. THORNHILL v. ALABAMA 310 U.S. 88 (1940)). Regulations of fully protected speech are subject to strict scrutiny.

GENTLE held that even the State constitutional interest in the fair administration of justice could not trump the First Amendment; nor could the fact that the lawyer speech falls within an ethical proscription mean that it is not entitled to full First Amendment protection. 44 LIQUORMART v. RHODE ISLAND 116 S.Ct. 1495 (1996) held that the Twenty -First Amendment "does not quality the constitutional prohibition against laws abridging freedom of speech embodied in the First Amendment." Likewise, Goetz's fully protected speech to his client, WHICH DOES NOT CLASH WITH A CONSTITUTIONAL RIGHT, cannot be trumped by the State's strong, but lesser nonconstitutional interest in assuring attorney loyality to a client. The proper standard for reassessing "proximity and degree of harm" should be no less than the test approved in GENTILE, namely "A Substantial Likelihood of Material Prejudice" (to a client). The conflict of interest claim against Goetz should have been dismissed because the "May Be Materially Limited" standard in the SCR 20:1.7(b) falls far short of the minimum standard approved in GENTILE. Moreover, even if the rule facially applies to Goetz's speech, the rule must be struck down under the overbreadth doctrine because it plainly sweeps in speech that fails to threaten client interests.

V. (b) Regulation Of Attorney Speech On Conflict Of Interest Grounds Under SCR 20:1.7(b) Is Unconstitutional, Both Facially And As Applied.

Goetz is not asking this Court to interpret state court decisions. That is no necessary. Nevertheless it is important to note that the arguments Goetz made in regard to the legal effect o of two

Wisconsin cases; NEWSPAPERS INC. v. BREIER 89 Wis. 2d 417 (1989) and STATE ex rel FOUST 165 Wis 2d 429 (1991). Neither the respondent nor the lower court contested Goetz's reading of those two cases. Rather the lower court accorded presumptive validity to an unproven hypothesis, i.e. that a lawyer may NEVER represent a client, and ALWAYS has a CONFLICT OF INTEREST whenever his advise to a client is consistent with his own self interest (notwithstanding the fact that that self interest - in the Goetz case - was not adverse to his client's interest).

Goetz had argued that the BREIER and FOUST cases supported his position that his self interest in not wanting the Sheriff's investigative file released pursuant to the open records demands. Prior to being served with the open records demands the Sheriff considered his file to have the status of a "closed file where no one was charged and where no one was likely to be charged." While the file held that status, the investigative file would have enjoyed protection from a public records disclosure under BREIER. When solicited by the Corporation Counsel as to what status he believed the Sheriff's file should have, Goetz offered that it should be considered to have "open" status in the District Attorney's office so that it could be reviewed for possible prosecution of former District Attorney Johnson for "asking" the Sheriff's department to conduct a criminal investigation into a noncriminal matter, contrary to sec. 944.12(2) Wis. Stats. for "Misconduct In Public Office." Under that new status, the file would have enjoyed protection from public records demands under FOUST. Therefore, Goetz argued, his self interest in not wanting the public records demands honored was merely coincidental and not adverse to client interests.

Goetz's reading of BREIER and FOUST was consistent with office policies in place in the District Attorney's office throughout the Goetz administration and his information and belief that these same policies existed for at least 10 years prior to his administration. Those pre-existing office policies made his self interest merely coincidental and not adverse to the issue of whether the Sheriff should honor the public records demands.

Application of SCR 20:1.7(b) against Goetz under those circumstances is contrary to his Court's holding that "the State cannot regulate speech that poses no danger to the asserted state

interest." See CENTRAL HUDSON GAS v. PUBLIC SERVICE COMM'N 100 S.CT. 2343, 2351 (1980). There is no record evidence of any harm to Goetz's client or any likelihood of harm, let alone a "substantial likelihood of material prejudice" to a client. At best, the lower court had a "mere speculation of harm" and that "does not constitute a compelling state interest." See MINEWORKERS v. ILLINOIS BAR ASSOCIATION 389 U.S. 217, 222-223 (1967).

In addition, the Official Comment to SCR 20:8.4 "plainly allowed" Goetz to do what he did on a good faith belief that no conflict of interest existed. There is no record evidence of a lack of good faith in Goetz's failure to "obey" SCR 20:1.7(b). therefore the finding that Goetz should be disciplined for violating the conflict of interest rule "is a due process violation of the most basic sort." BORDENKIRCHER, supra.

Moreover, the rule must also be struck under as overly vague because the "May Be Materially Limited" standard was used as a basis for a finding adverse to Goetz even though there is no record evidence that he was disloyal to his client or that his alleged "conflict" had on was likely to have an adverse effect on his representation. This encourages discriminatory enforcement of all attorney disciplinary rules and a substitution of rules for reasons.

Finally, Goetz could have, and perhaps should have, offered his "advise" to the Corporation Counsel/Sheriff in an "unofficial capacity." Had Goetz, in the midst of a heavy caseload and generally heavy demands on his time, seen this as the "politically correct" way to represent his client without "really" representing his client, he would not have to face the present situation which substitutes rules for reasons. The fact that Goetz could have followed that alternative method of "advising" the Sheriff presents yet another reason why the "Conflict of Interest" claim, which put an absolute ban on any advice in an official capacity, should have been dismissed by the lower court. This bespeaks of the situations that this court had in mind when it observed in In Re R.M.J. 455 U.S. 191 203 (1982) that:

> "the States may not place an absolute prohibition on certain types of potentially misleading information...if the information also may be presented in a way that is not deceptive."

This shows why prophylactic rules are not the least restrictive

possible means of achieving a substantial governmental interest.

BURDEN OF PROOF – NON-SPEECH CONDUCT

VI. The State's Interest In Regulating The Legal Profession For Non-Speech Conduct Does Not Relieve The State Of Justifying The Regulation Under The 4-Part Inquiry From UNITED STATES v. O'BRIAN

The lower court seems to have held that all three claims against Goetz related to "Conduct" rather than speech, DESPITE ITS CONCERN FOR COMMUNICATIVE IMPACT. If there was a non-speech element in each of the three claims, then the State would still have the burden of proving the regulation(s) of the non-speech conduct could be upheld by meeting the 4-part inquiry under UNITED STATES v. O'BRIAN 391 U.S. 367 (1968). Under O'BRIAN governmental regulation of non-speech conduct, incidentally impacting on speech can be justified if: 1) the regulation is within the constitutional power of government, 2) the regulation furthers an important and substantial governmental interest, 3) the governmental interest is unrelated to the suppression of free expression, and 4) the incidental restriction of First Amendment freedoms is not greater than essential to the furtherance of that interest. There is nothing in the record that indicates that the lower court considered the 4-prong O'BRIAN inquiry when it ignored Goetz's arguments that all three claims related to fully protected speech.

It is entirely appropriate for this court to provide the lower courts with guidance on how to properly make a distinction between pure speech by attorneys and non-speech conduct, incidentally impacting on speech. Clearly the distinction must go beyond mere labels.

The doctrine set fourth in MARKS v. UNITED STATES 430 U.S. 188 (1977) must be applied in reading BARNES v. GLEN THEATER INC. 111 S.Ct. 2456 (1991). In applying the MARKS doctrine, the narrowest and controlling opinion in BARNES is that on Mr. Justice Souter. In applying the 4-part O'BRIAN test to the regulation of nude dancing, the controlling opinion in BARNES indicated that "society's moral views" were not sufficient to justify such regulations, but rather such prohibitions must be based on the State's interest in combatting adverse secondary effects.

It is entirely appropriate for this Court to give lower courts guidance as to whether the second prong of the O'BRIAN test, when applied to attorney "conduct" can only be satisfied with reference to the State's interest in controlling secondary effects. If so, it would be further appropriate for this Court to give the lower court guidance as to whether the secondary effects must be proved at the time of enactment of the regulation and considered in enacting the regulation, or, as a minimum, whether the breadth of these restrictions prohibit only those forms of attorney speech/conduct that have caused adverse secondary effects regardless of whether actually considered at the time of enactment. Either way, this Court noted in TURNER BROADCASTING SYSTEM INC. v. FCC 114 S.Ct. 2445 (1994); "When trenching on first Amendment interests, even incidentally, the Government must be able to adduce empirical support or at least sound reasoning on behalf on its measures." This is critical to the narrow tailoring step of the O'BRIAN analysis.

TAXATION OF COSTS AND ATTORNEY FEES

VII. The First Amendment Justifications For The Allocation Of The Burden Of Proof, Mandated By This Court, On Regulations Of Pure Speech As Well As Non-Speech Conduct Incidentally Impacting On Speech, also Justify Imposing Costs And Attorney Fees On Would-Be Regulators

This court has never directly addressed whether the First Amendment places limits on the regulation or punishment of attorneys in these areas unrelated to pending cases or noncommercialal speech; therefore this Court has never directly addressed whether the State's costs in prosecuting an attorney under such regulations should be borne by would-be State regulators. It is singularly important for this court to provide guidance to the lower courts on this issue, even if it were to find adequate state grounds to uphold the lower court's decision against Goetz on one or more of the three substantive claims.

Even in the area of commercial speech, by attorneys, this Court has recognized that the State's burden of proof, imposed on the States by the First Amendment, includes the burden of bearing the "costs" involved in enforcing regulations concerning commercial speech, ZAUDERER, supra., observed:

> "Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is calculable enough to justify imposing on would-be regulators the COSTS of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful....(emphasis supplied)

ZAUDERER's above reference to imposing "COSTS" on Would-be regulators was cited by this Court in a more recent attorney disciplinary case of IBANEZ v. FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION 114 S.Ct. 2081 (1994) involving advertising.

Even if the First Amendment does not flatly impose the financial costs of distinguishing harmless lawyer speech from harmful lawyer speech on would-be regulators, then, as a minimum, the narrowly tailoring requirements of strict scrutiny make it entirely appropriate for the court to establish a standard the lower courts must use before imposing such costs on one party rather than the other. This should go beyond focusing on results favorable to the state regulators. (In the Goetz case, SCR 22.20(1) allows the state regulator to recover on successful results but does not give equal protection and allow the attorney to recover his costs if he/she obtains dismissal of the charges).

This case was not a case where Goetz "pretended" that the law favored his view of the First Amendment and unfairly imposed the burden of research on the courts and his adversaries. Goetz made a good faith challenge to the validity, scope, meaning, and application of the State's regulations of attorney speech. This case did no involve intensive factual disputes; it involved "pure" questions of law. Even under frivolous claims statutes it appropriate for courts to consider HOW FAR from the correct legal position a party has to travel to commit a sin under such statutes; that question is a question of degree. The next question is a question of application; a legal position light be "frivolous" as applied to factual pattern "X" but not as applied to factual pattern "Y". See MARS STEEL CORP. v. CONTINENTAL BANK N.A. 880 F.2d 928, 938 (7th Cir. 1989).

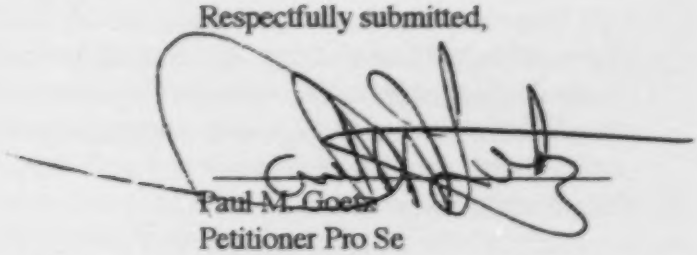
Any standard for the imposition of financial costs against a party raising First AMendment defenses must not chill the exercise of First

Amendment rights. As a minimum, any "reasonable investigation" into the law should give a party sanctuary from paying the costs of the would-be regulators. This ensures that such parties may take novel, innovative positions and does not jeopardize advocacy or legal evolution. (See MARS STEEL, supra., at 932 and its reference to the standard to be applied to the federal frivolous claims statute). When First Amendment defenses are involved the defense should not have any less protection from the imposition of the state regulator's costs of litigation against him. Such a litigant should also have a right to recover his costs of litigation if he is successful in his/her defense. Wisconsin's failure to give parties such as Goetz the remedy of recovering his financial costs, in the face of bona fide First Amendment defenses will have a chilling effect on parties having less fortitude and resolve than Goetz. SCR 22.20(1), which gives the state regulator the right to recover costs upon a successful result, but does not give Goetz and the whole class of attorneys he represents an equal right to recover his costs, should be declared constitutionally void.

CONCLUSION

For the foregoing reasons, petitioner Goetz respectfully urges that this Court grant him his petition of certiorari or summarily revers the rulings of the court below.;

Respectfully submitted,



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APPENDIX

STATE OF WISCONSIN IN SUPREME COURT

In the Matter of Disciplinary Proceedings Against PAUL M. GOETZ, Attorney at Law
213 Wis. 2d 494 (1997)

FILED

Nov. 7, 1997

ATTORNEY disciplinary proceeding. Attorney publicly reprimanded

¶1 PER CURIAM Attorney Paul M. Goetz appealed from the referee's conclusions that he engaged in professional misconduct and from the recommendation that the court publicly reprimand him for that misconduct. The misconduct concerned Attorney Goetz's having used a fictitious name in signing a letter he submitted to a newspaper for publication criticizing a district attorney, acting in the presence of a conflict of interest when, after being elected and taking office as district attorney, he advised the county corporation counsel on a request his predecessor had made to the sheriff for the release of the investigative file concerning the letter to the newspaper and its authorship, and refusing to answer questions in the investigation of his conduct concerning his role in authoring, publishing or mailing other letters derogatory of the district attorney.

¶2 We determine that the referee properly concluded that Attorney Goetz engaged in professional misconduct by his actions in these matters. We also determine that the nature and seriousness of that misconduct warrant imposition of the public reprimand recommended by the referee. Attorney Goetz's misrepresentation constitute serious breaches of his professional obligations as a person licensed to represent others and as an officer of the justice system. He also breached his obligation to cooperate in the investigation by those this court has authorized to investigate and, when deemed appropriate, prosecute allegations of attorney misconduct.

¶3 Attorney Goetz was admitted to practice law in Wisconsin in 1973 and practices in Wausau. He was elected and served as Lincoln county district attorney from 1993 to 1995. He has been disciplined once previously: he consented to a private reprimand from the Board of Attorneys Professional Responsibility (Board) in March, 1993 for failing to prepare for an administrative hearing on

his client's equal rights claim and failing to give the client notice until the day of the hearing of his intention not to represent him at that hearing, thereby depriving the client of the opportunity to employ other counsel.

¶4 The referee in this proceeding, Attorney John E. Shannon Jr., made findings based on facts to which the parties stipulated prior to the disciplinary hearing and on the evidence presented at the hearing. In his answer to the Board's complaint, Attorney Goetz admitted that he wrote a letter to the editor of the Wausau Daily Herald dated December 9, 1991 under the assumed name of Marie Conley, purporting to reside in Merrill, Wisconsin, with the intention of concealing his identity as the author of that letter when submitting it for publication. In that letter, he expressed displeasure with the majority of politicians and attacked specifically the district attorney for Lincoln county, Kenneth Johnson, suggesting that he had contempt for the law and thought himself above the law. The letter referred to a public reprimand this court had imposed on District Attorney Johnson in 1991. The referee concluded that by writing and submitting that letter to the newspaper for publication under a false name, Attorney Goetz engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of SCR 20:8.4(c).[1]

¶5 In late spring or early summer of 1992, Attorney Goetz ran against District Attorney Johnson and was elected in November of that year. During the Campaign, District Attorney Johnson received the following three letters. The first, received in July, was a copy of the December 9, 1991 letter published in the newspaper, on which was typed language, including an offensive epithet, attacking District Attorney Johnson's honesty, integrity and "mental status." It listed seven names as signatories, including "Marie" and "Others too numerous to mention."

¶6 The second letter, which was received in August, made reference to a court case in which District Attorney Johnson had appeared. it stated that opposing counsel in that case pointed out

[1]SCR 20:8.4 provides, in pertinent part:**Misconduct**
It is Professional misconduct for a lawyer to:

...

(c) engage in conduct involving dishonesty, fraud, deciet or misrepresentation;

how District Attorney Johnson was misrepresenting facts. The letter referred to the district attorney as a "sociopath" and was signed "Marie Conley." The third letter, replete with offensive epithets, was received in September. It alleged that District Attorney Johnson attempted to discredit the clerk of courts by investigating that office's retention of a portion of passport fees. This letter, too, made reference to the district attorney's public reprimand and was signed "Peter Robinski."

¶7 After receiving the second letter, District attorney Johnson asked the sheriff's department to investigate whether it and the July letter violated state law. He subsequently amended his complaint to the sheriff to include the third letter. The sheriff's officer conducting the investigation suspected that Attorney Goetz had written the three letters and sent them to the Federal Bureau of Investigation for analysis, together with exemplars of typewritten documents that had been signed by Attorney Goetz on his office letterhead stationery. The FBI determined that the letters and the exemplars originated from the same typewriting source.

¶8 The officer sent his report of the investigation to the sheriff September 1, 1993, and the sheriff then asked the Wisconsin Department of Justice to investigate the district attorney's complaint. Three months later the Department of Justice responded that it saw nothing further that needed to be done from an investigative standpoint and that it would not consider forwarding the matter to a prosecutor. The sheriff informed his officer of that response and suggested the file be closed.

¶9 In March, 1994, Attorney Johnson made two public record requests to the sheriff for copies of documents in his department file concerning the investigation of the complaint he had made about the three letters. The sheriff did not respond to those requests for approximately four weeks. He did, however, tell District Attorney Goetz of the public records requests and showed him a copy of the officer's investigative report, a copy of the letter forwarding the file to the Department of Justice, and a copy of the department's response. At the same time, the sheriff told District Attorney Goetz of the typewriter comparison linking the typewrite in his law office to the three letters.

¶10 In response to that information, District Attorney

Goetz told the sheriff it was his opinion the letters did not amount to criminal conduct and that the public records request should be denied. On April4, 1994, the sheriff asked the county corporation counsel for a legal opinion on the status of the records Attorney Johnson had requested. The corporation counsel responded that as of April 7, 1994, the investigator and those who had conducted the administrative review of the investigation considered it a closed file.

¶11 On April 25, 1994, the corporation counsel told District Attorney Goetz that the Wausau Daily Herald had made public records requests for correspondence between former District Attorney Johnson and the sheriff's department between January 1, 1993 and APril 18,1994, during which time Attorney Johnson had requested the investigative files. Corporation counsel asked District Attorney Goetz to advise her if he claimed any legal reason to deny the release of the correspondence to the newspaper, adding that if she heard nothing from him by midday, April 26, 1994, she would instruct the sheriff's department to release the material.

¶12 District Attorney Goetz wrote the corporation counsel that the requested records were part of an open file in his office, adding that up to that point no one had been charged with a crime but that the letters sought by the newspaper related to an open file in which he might decide to file charges against a former Lincoln county official for misconduct in office. District Attorney Goetz also stated that unless and until charges were filed, there would be no release of information from his office and asserted that if it was not appropriate for him as a prosecutor to release information on the file to the press, "[I]t clearly is not appropriate for you to direct the sheriff to release information to the press." The referee concluded that Attorney Goetz violated SCR 20:1.7(b)[2] by attempting to persuade

[2]SCR 20:1.7 provides, in pertinent part: **Conflict of interest: general rule**

...

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will bot be adversely affected; and

(2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks invlived.

the corporation counsel to advise the sheriff not to release records Attorney Johnson and the newspaper had requested when he knew he was the object of the investigation to which those records related.

¶13 After Attorney Johnson filed a grievance with the Board concerning Attorney Goetz's conduct in respect to the first "Conley" letter and the three subsequent campaign letters and concerning his conduct as district attorney regarding the public records requests made to the sheriff's department, the Board referred the matter to the dtsrtict professional responsibility comittee for investigation. That committee asked attorney Goetz whether he was responsible for authoring, publishing or mailing the campaign letters and whether he thought they were offensive. Attorney Goetz responded, "that is not something I would do...I find your questions offensive." Thereupon, Attorney Goetz stopped answering questions and insisted that the committee review the "legal Authority" he had cited and furnish him with and authority the committee found in support of the Board's authority to ask questions about the campaign letters. The referee concluded that Attorney Goetz's refusal to answer the committee's questions concerning whether he had any role in authoring, publishing or mailing the campaign letters constituted a refusal to cooperate in the Board's investigation, in violation of SCR 21.03(4)[3] and 22.07(3).[4]

¶14 After the investigative meeting ended, Attorney Goetz was notified of the date of a second investigative meeting before the committee, Attorney Goetz did not appear at that meeting, for the stated reason that he had scheduled three court hearings during that morning and was unable to have them rescheduled. The referee

[3]SCR 21.03 provides, in pertinent part: **General principles**.

...

(4) Every attrney shall cooperate with the board and the administrator in the investigation, prosecution and disposition of grievances and cmplaints filed with or by the board or administrator.

[4]SCR 22.07 provides, in pertinent part: **Investigation**

...

(3) The administrator or committee may compel the respondent to answer questions, furnish documnets and present any information demed relevant to the investigation. Failure of the respondent to answer questions, furnish documents or present committee may compel any other person to produce pertinent books, papers and documents under SCR 22.22.

found that it was reasonable for Attorney Goetz to assume that the second meeting would begin in the afternoon, as the first had done, and, consequently, his nonattendance at the morning meeting did not constitute a refusal to cooperate in the Board's investigation.

¶15 In this appeal, Attorney Goetz argued that he referee improperly concluded that he had engaged in misconduct by using a fictitious name of the December, 1991 letter he submitted to the newspaper for publication for the reason that the letter constituted "core political speech" criticizing a public officer and as such enjoyed constitutional protection. Further, he contended, that protection extended to his use of the false name as the author of that content, as the name was "inextricably intertwined" with the letter's political content. Attorney Goetz had made that argument during the course of the disciplinary proceeding, and the referee correctly rejected it, as well as Attorney Goetz's insistence that his use of the false name was nothing more than his attempt to remain anonymous in criticizing a public official. In this appeal, the board noted that Attorney Goetz elected not to use a non-deceptive means of concealing his identity, for example, using a obviously fabricated name, "Anonymous," or his own name but asking that it not be published. As he testified at the disciplinary hearing, attorney Goetz was concerned that the newspaper might not publish the letter if it were signed "Anonymous" or with an obviously fabricated name and, further, that it might not protect his identity had he given it.

¶16 As the referee determined, it was not Attorney Goetz's criticism of the district attorney in that letter that is the issue; it is the deceptive means he employed to have that criticism published by a reputable newspaper and communicated to its readership. Attorney Goetz misrepresented his identity as a lawyer attacking the professional integrity of the chief law enforcement official of the county, thereby reflecting adversely on attorney Goetz's professional position.

¶17 Attorney Goetz also argued that the rule the referee concluded he has violated, SCR 20:8.4(c), is not applicable to that conduct, as there is a more specific rule that he contended applies exclusively. That rule, SCR 20:8.2, prohibits a lawyer from making a statement the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a

judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office. That argument has no merit for the reason already given: the misrepresentation did not concern the statements made in the letter about the district attorney; it was the falsification of the letter writer's identity in order to have those statements published.

¶18 On the issue of whether the referee properly concluded that he acted in the presence of a conflict of interest when advising the corporation counsel concerning the release of the sheriff's department records of an investigation of which he was the object, Attorney Goetz contended that he did not have a "client" when corporation counsel sought his advise in the matter and thus could not have violated the specified rule . He also argued that a waiver by the corporation counsel of any conflict may be inferred from the facts that he had referred the sheriff to corporation counsel, assertedly because there would be an appearance of a conflict of interest as a result of the involvement of his office in the matter, the sheriff went to the corporation counsel for advice, and corporation counsel thereafter sought his advice in the matter.

¶19 Regardless whether the county was a"client" in the usual meaning of the word when applied to a lawyer's representation, there is no question that District Attorney Goetz was being asked in his official capacity the status of a file in his office by another legal representative of the county. Rather than turning the request over to someone else in his office, he took the official position that the file in his office remained open, saying that he night decide to prosecute his predecessor for having asked the sheriff to investigate what he considered a non-criminal matter, and actively advocated that the public records requests be denied.

¶20 We find no merit to the waiver argument, as the corporation counsel's request for advice was with respect to whether there was reason to advise the sheriff not to release the information because there was an open file in the district attorney's office that was connected to it. Moreover, there is no indication that the corporation counsel was aware that the subject of the investigation about which the records had been requested was the very person who was advising her not only in respect to the open status of a file in his office but also on whether it was appropriate that she advise the sheriff to release the

records. Likewise meritless is Attorney Goetz's contention that any personal interest he might have had in the matter was "merely coincidental" to what he termed his pursuit of a long-standing policy in the district attorney's office not to honor a public records request for closed investigative files when no one was charged or likely to be charged.

¶21 In respect to his refusal to answer questions from the investigative committee concerning his involvement in the three campaign letters, Attorney Goetz argued that the Board's allegation that he failed to cooperate in the investigation must fail because the referee found that one of the two acts on which that allegation was premised, namely, his failure to attend the second investigative meeting, did not constitute a failure to cooperate in the investigation. He also contended that the three campaign letters constituted "core political speech" implicating First Amendment rights and that he was constitutionally entitled to refuse to answer the questions concerning them. Neither of these arguments has merit. The FBI report linking those letters to a typewriter in Attorney Goetz's office gave the district committee cause to believe Attorney Goetz might have had some involvement in or knowledge of their creation, and it was reasonable that the committee ask him what he knew about the letters.

¶22 We adopt the referee's findings of fact and conclusions of law concerning Attorney Goetz's misconduct in these matters. On the issue of discipline to be imposed, the Board took the position that the public reprimand recommended by the referee is appropriate in view of the multiple acts of misconduct established in this proceeding, Attorney Goetz's refusal to acknowledge any wrongdoing, and the private reprimand imposed on him, with his consent, for misconduct that occurred just prior to his submission of the "Marie Conley" letter for publication. We agree.

¶23 In addition to that public reprimand, the referee recommended that the court require Attorney Goetz to pay the costs of the disciplinary proceeding. Attorney Goetz filed an objection to the assessment of costs against him and renewed that objection following submission by the Board of the costs it incurred in this appeal. None of the grounds set fourth in that objection has merit with the exception of the contention that a portion of the costs

itemized by the board already might have been taxed against Attorney Goetz in a proceeding he had unsuccessfully pursued in circuit court to enjoin this proceeding. Accordingly, we hold the matter of costs in abeyance pending resubmission by the Board of costs it incurred in this proceeding prior to the filing of Attorney Goetz's appeal, deleting therefrom those costs clearly identifiable and traceable to time and expenses incurred in the injunction proceeding that were taxed against Attorney Goetz. Following that submission, Attorney Goetz will be afforded the opportunity to respond.

¶24 IT IS ORDERED that Attorney Paul M. Goetz is publicly reprimanded as discipline for professional misconduct.

¶25 IT IS FURTHER ORDERED that the assessment of costs of this proceeding shall be held in abeyance pending further order of the court.

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SUPREME COURT
110 E MAIN STREET, SUITR 715
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

TELEPHONE (608) 266-1880
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December 17, 1997

To:

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Board of Attorneys Prof. Responsibility
110 E. Main Street, #410
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Attorney William Weigel
Board od Attorneys Prof. Responsibility
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You are hereby notified that the Court has entered the following order:

In the Matter of Disciplinary Proceedings
Against PAUL M. GOETZ, Attorney at Law — Case No. 96-1438-D

On November 24, 1997, Paul M. Goetz filed a motion for reconsideration of the court's opinion and order issued November 7, 1997 publicly reprimanding him for professional misconduct. The Board of Attorneys Rofessional Responsibility filed a response in oposition to that motion.

The court finds no merit to the grounds stated in the motion for reconsideration.

IT IS ORDERED that the motion for reconsideration is denied. $50 costs

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Marilyn L. Graves
Clerk of Supreme Court

STATE OF WISCONSIN
IN THE SUPREME COURT

In The Matter of The Disciplinary Proceedings Against:

Case No.: 96-1438-D

PAUL M. GOETZ,
Attorney at Law,

Respondent.

REPORT AND RECOMMENDATION OF REFEREE

This disciplinary proceeding involves three professional misconduct charges against Respondent arising out of his conduct and activities before, during and after his tenure as Lincoln County District Attorney from January, 1993 until January, 1995.

The first claim charges Respondent with having violated SCR:20:8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by submitting a letter to the Wausau Daily Herald for publication under the false name of "Marie Conley" which was published by that newspaper on December 9, 1991. (See Exhibit A of the Complaint or Exhibit 1 of Stipulation.)

The second claim charges Respondent with having violated SCR:20:1.7(b) (conflict of interest) by providing legal advice and direction to the Lincoln County Sheriff's Department and the Lincoln County Corporation Counsel concerning certain open records requests where Respondent had a conflict on interest regarding those requests because he knew he was an object of the investigation which was subject of those open records requests.

The third claim charges Respondent with having violated SCR:21.03(4) and SCR:22.07(3) (failure to cooperate) in failing to cooperate with the Board's investigation by refusing to answer the District 16 Committee's questions concerning whether he had any role in authoring, publishing or mailing letters other than the December 9 Conley letter and by failing to appear at a November

10, 1995 investigative meeting before the District 16 Committee.

The complaint for discipline against Respondent was filed on May 17, 1996 by Attorney Paul Schwarzenbart on behalf of the Board of attorneys Professional Responsibility. On May 31, Respondent filed a Notice of Motion and Motion to Dismiss on the ground that the Complaint fails to state a claim upon which relief can be granted. A telephone scheduling conference was held on June 11 and a briefing schedule was set. Both sides filed extensive briefs on the issues of law presented by Respondent's motion. Respondent in his briefs supporting his motion to dismiss took the position that not only was the Complaint defective but the Subject Supreme Court Rules were likewise defective because they were in violation of his constitutional rights.

A second telephone scheduling conference was held on August 21 at which time I entered an order denying Respondent's motion to dismiss in all respects and I ordered the Respondent to answer the Complaint on or before September 10, 1996.

On September 10, instead of filing an answer, Respondent filed additional motions which he styled "RESPONDENT'S NOTICE AND MOTION TO RECONSIDER PRIOR MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER." On that date, Respondent also filed a Motion to Quash Discovery and for Summary Judgment with supporting affidavits requesting dismissal of all three charges as a matter of law. All of these motions were taken under advisement by me and on September 25 I denied Respondent's motions for reconsideration and for dismissal for lack of subject matter jurisdiction as well as Respondent's motion to quash discovery. Respondent was also ordered to file and serve his answers on or before October 15, 1996. On that date, Respondent filed an answer with numerous affirmative defenses and the issues were at last joined.

In his answer, Respondent admitted he wrote the December 9 Marie Conley letter which was the subject of the first claim. See paragraph 2 of the answer. He also admitted he intended to conceal his identity as the author by signing the letter

"under a pseudonym." See paragraph 4 of the answer.

On October 21, 1996 another telephone scheduling conference was held at which time I advised counsel that I was of the opinion that Respondent had violated SCR:20:8.4(c) based on the admissions in his answer. I further advised counsel that none of the 17 affirmative defenses to the first claim, either separately or collectively, constituted a valid defense. I, therefore, found as a matter of law based on the record that Respondent had violated SCR:20:8.4(c). I further found that there were issues of fact as to the second and third claims that needed to be determined after a full and fair hearing. See Decision and Order of Referee dated October 21,1996.

in December, 1996 the parties entered into a written pre-hearing stipulation to which are attached 39 exhibits. This stipulation is on file and part of the record herein. At the hearing held before the undersigned as referee on December 23, 1996, only two witnesses testified, the Respondent and Attorney C. Duane Patterson, Chairman of the District 16 Professional Responsibility Committee.

At the conclusion of the hearing on December 23, I requested briefs from counsel concerning the Second and third claims and those briefs have been filed and considered by me.

All findings made herein are based on clear and convincing evidence as reflected in the record, including the pleadings, the pre-hearing stipulation with 39 exhibits and the testimony adduced at the hearing as reflected in the hearing transcript, all on file herein.

FINDINGS OF FACT
AS TO CLAIM ONE (DECEIT)

I find the following facts:

1. The Respondent, Paul M. Goetz, is and had been at all times mentioned herein an attorney licensed to practice law in the State of Wisconsin and was and is a member of the State Bar of Wisconsin whose office is located at 324 1/2 Washington Street, Wausau, Wisconsin 54402. He was admitted to practice law in the State of Wisconsin in 1973 and is a resident of the State of

Wisconsin.

2. Respondent was the subject of prior discipline having accepted a private reprimand in March, 1993 for a violation of SCR:20:1.1 (Competent representation) and for a violation of SCR:20:1.16(d) (protection of client's interests upon termination of representation). See Stipulation, Exhibit 39.

3. Respondent wrote the December 9, 1991 Marie Conley letter as a letter to the editor of the Wausau Daily Herald and that he intended to conceal his identity as the author of tat letter. (Admissions in Answer, paragraphs 2, 4 and 17).

AS TO CLAIM TWO (CONFLICT OF INTEREST)

4. Respondent was elected as district attorney for Lincoln County in the November, 1992 election and served in that capacity from January, 1993 until January, 1995. (Complaint, paragraph 11; admitted in paragraph 8 of Answer.) Respondent defeated the incumbent, Attorney Ken Johnson, in that election.

5. Following publication of the December 9, 1991 Marie Conley letter in the Wausau Daily Herald, three more letters were written and sent to Attorney Johnson in July, August and September, 1992. These three letters, along with the December 9, 1991 letter are referred to in the Complaint as the "campaign letters." (Paragraph 9, Complaint.) The second letter was a copy of the December 9, 1991 Marie Conley letter with some additional typewritten material under which several first names were typed, including the name "Marie." The third letter was typewritten and identified Marie Conley as the author and the fourth letter, also typewritten, identified Peter Robinski as the author. (See Exhibits A, B, C and D of Complaint.)

6. In August, 1992, Attorney Johnson (then Lincoln County District Attorney) filed a complaint with the Lincoln County Sheriff's Department requesting that the Sheriff's Department investigate whether the mailing of the July and august Conley letters violated state law. On September 1, 1993, Sgt. Rom Hirte of the Lincoln County Sheriff's Department sent a report concerning his investigation of Attorney Johnson's complaint to the Lincoln County Sheriff, Harvey Woodward. In September,

1993, the Lincoln County Sheriff's Department asked Wisconsin Department of Justice to investigate Attorney Johnson's complaint concerning these letters. On December 9, 1993, the Wisconsin Department of Justice advised Sheriff Woodward that they (Wisconsin Department of Justice) did not see anything further that needed to be done from an investigative standpoint and that they would not consider forwarding the matter to a prosecutor. (Exhibits 5, 6 and 7 of Stipulation.)

7. On December 14, 1993, Sheriff Woodward advised Sgt. Ronald Hirte of the December 9 letter from the Wisconsin Department of Justice and suggested he close his files and move on to higher priority investigations. (Exhibit 8 of Stipulation.)

8. In March, 1994, attorney Johnson made two requests of Sheriff Woodward under the Wisconsin Open Records law for copies of documents in the file maintained by the Lincoln County Sheriff's Department concerning the investigation of Attorney Johnson's complaint about the July and August Conley letters and the September Robinski letter. (Exhibits 9 and 10 of Stipulation.)

9. Respondent was advised by Sheriff Woodward of Attorney Johnson's open records request concerning the four campaign letters and he told the sheriff that it was his opinion that those letters did not amount to criminal conduct and that the open records requests should be denied. (Paragraph 11, Answer.)

10. On April 4, 1994, Sheriff Woodward requested a legal opinion from Attorney Nancy Bergstrom, Lincoln County Corporation Counsel, on the status of the records requested by Attorney Johnson. On April 14, 1994, Corporation Counsel Bergstrom wrote to Sheriff Woodward confirming that as of April 7, 1994, the sheriff, Sgt. Hirte, and Leonard Belstner (DCI - White Collar Crimes), who conducted the administrative review of the sheriff's Department's investigation, all considered it as a closed file. (Exhibit 14 of Stipulation.)

11. On April 25, 1994, Corporation Counsel Bergstorm wrote to Respondent as Lincoln County District Attorney advising that on April 18, 1994, the Wausau Daily Herald made a records request for "correspondence between former Lincoln County District Attorney Ken Johnson and the Lincoln County Sheriff's Department between January 1, 1993 and April 18, 1994."

Corporation Counsel Bergstorm stated that Respondent should advise her if he claimed any legal reason to deny such release and that if she heard "nothing from you by noon on Tuesday, April 26, 1994, I will direct the Sheriff's Department to release what they have." (Exhibit 15 of Stipulation.)

12. On April 26, 1994, Respondent wrote to Corporation Counsel Bergstrom stating that the requested records "are part of an open file in my office." Respondent advised that up to that point no one has been charged with a crime but that the letters sought by the Wausau Daily Herald relate to an open file where "I may decide to file charges against a former Lincoln County official for misconduct in office." He also stated that unless and until charges are filed, "there will be no release of information from my office" and that if "it is not appropriate for me, as a prosecutor, to release information on this file to the press, then it clearly is not appropriate for you to direct the sheriff to release information to the press." (Exhibit 17 of Stipulation.)

13. By a letter addressed "To Whom it May Concern" dated and published on or about May 3, 1994, Respondent first admitted that he was responsible for authoring and publishing the December 9 Conley letter. (Paragraph 17 of Complaint, admitted in Answer, paragraph 14.)

AS TO CLAIM 3 (FAILURE TO COOPERATE)

14. On or about July 12, 1994, Attorney Johnson filed a grievance with the board as to Respondent's conduct in relation to the campaign letters. The grievance addressed Respondent's involvement in the authorship and publication of the December 9 Conley letter and the other campaign letters and respondent's conduct in relation to Attorney Johnson's open records requests. (Paragraph 18 of Complaint admitted in Answer, paragraph 14.)

15. the Board Administrator referred the Johnson grievance to the District 16 Professional Responsibility Committee for investigation. (Paragraph 19 of Complaint, admitted in Answer, paragraph 14.)

16. The District 16 Committee investigated the Johnson grievance in accordance with SCR:21.08(3) and in the course of

its investigation, the Committee asked respondent Whether he was responsible for authoring, publishing or mailing the December 9 Conley letter or any of the other campaign letters. (Paragraphs 20 and 21 of Complaint, admitted in Answer, paragraph 14.)

17. At a Committee meeting on August 11, 1995, when Respondent was asked if he felt the three 1992 letters (Exhibits B,C and D of Complaint) were offensive and he replied "that is not something I would do" and Respondent further replied that "I find your questions offensive." He then stopped answering questions and insisted the Committee review his "legal authority" and furnish him with any authority it found in support of the Board's authority to ask further questions about the disputed letters. (Admissions in paragraph 15 of Answer.)

18. Respondent failed and refused to appear at a second investigative meeting before the District 16 Committee on November 10, 1995. (Paragraph 23 of Complaint, admitted in Answer, paragraph 16.)

19. Although Respondent was advised of the date of the November 10, 1995 meeting with the Committee well in advance of that date, he was not advised that the meeting would start at 9:30 a.m. until November 3. He had previously scheduled three court hearings during the morning of November 10 which he could not change. The previous investigative meeting he appeared at on August 11 was held in the afternoon and he assumed the November 10 meeting would also be held in the afternoon. (Transcript, pp.122-132; Exhibits 35, 36 and 37 of Stipulation.)

20. Under the circumstances, it was not unreasonable for Respondent to assume the second investigative meeting on November 10 would be set for the afternoon. (Transcript, pp. 170-173.)

I find the following:

CONCLUSIONS OF LAW

1. Respondent, by writing the letter referred to as the "Marie Conley" letter dated December 9, 1991 and submitting it for publication to the Wausau Daily Herald under the false name of Marie Conley, engaged in conduct involving dishonesty, fraud,

deceit and misrepresentation in violation of SCR:20:8.4(c).

2. Respondent, by attempting to persuade Lincoln County Corporation Counsel Bergstrom to advise the sheriff not to release the records requested by Attorney Johnson when Respondent knew he was an object of the investigation concerning the Conley campaign letters, violated SCR:20:1.7(b).

3. Respondent, by refusing to answer the District 16 Committee's questions at the August 11, 1995 meeting concerning whether he had any role in authoring, publishing or mailing of the campaign letters other than the December 9 Conley letter, violated SCR:21.03(4) and SCR:22.07(3).

RECOMMENDATIONS

Based on the foregoing findings of fact and conclusions of law, it is my recommendation the Respondent be publicly reprimanded and that he be ordered to pay all costs and disbursements of this disciplinary proceeding pursuant to SCR:21.12(2) and SCR:22.20.

Dated at Stevens Point, Wisconsin this 30th day of January, 1997.

BY THE COURT:

s/John E. Shannon, Jr.
John E. Shannon, Jr.
Supreme Court Referee
1257 Main Street, P.O. Box 228
Stevens Point, WI 54481-0228
Telephone: 715/344-0890

Letters to the Editor

Reader says Johnson has Contempt for Law

EDITOR: I read a short story about Dan Quale in your Newsmakers section Tuesday, citing, "a classic example of U.S. doublespeak" used by politicians. Like many members of the general public, I am fed up with 90 percent of our politicians at all levels.

After reading the article on Dan Quale, I then read your story about Lincoln County district attorney. Ken Johnson appears to be the stereotype politician, having held elective office all or most of his adult life, first in Dodge County and then, despite a pending investigation into his character for professional misconduct, appointed by Gov. Tommy G. Thompson to Lincoln County in "public service." Unfortunately, in his case he has forgotten that his roots are with the public and his history has been one of arrogance of power much like that found in Richard Nixon. During the Watergate crisis, Nixon once referred to himself as the "sovereign" and did more than imply that he was above the law.

In your interview with Ken Johnson, he masterfully sidestepped the issues. Johnson highlighted how he "fought accusations three times and

won three times."

Uh, Ken Johnson, could you try to give straight answers to straight questions? Why did the highest court in the state of Wisconsin see fit to publicly reprimand you and order you to pay $12,156 investigation costs for a mere technical violation? Could it be that you spent as much or more money trying to cover up this technical violation? Why did you not simply admit to an error (either negligence or a mistake in judgment) and get it over with? Does not your characterization of being found guilty of a mere "technical violation" amount to an admission of contempt for the law and the Wisconsin Supreme Court? If you continue to have contempt for the law and think of yourself as above the law, should you be charged with enforcement of the law? What will you do next–Try to write off $12,156(plus the financial drain of having to hire a criminal lawyer from Milwaukee) on your income tax, thus making all taxpayers subsidize your wrongdoing?

Marie Conley, Merrill

The reprimand by the Wisconsin Supreme Court last year will have have hugh effect on the current election–YOU SON OF A BITCH SO WILL HONESTY. If you really believe you were cleared twice of wrong doing (in spite of the reprimand and that requirement that you pay $12,156 investigation costs) then, your mental status is in question (in addition to your intergrity.

I/We cannot wait to see you on the unemployment line.

Marie
Jackie
Kurt
Ron
Dave
Janet
Mike
Others too numerous to mention

September 13, 1992

Ken Johnson:

Hello Asshole.

I just got the official word. Janet Beyer Thums got 101 more votes than you did dispite your efforts to discredit her with the investigation into the Clerk of Courts' long time, public and up front practice of keeping $10 from each passport issued by her office.

You are a dam fool. Only a damm fool would fail to realize the backlash such a personal vendetta would create. the public are not fools: they do not like assholes who abuse the power of their office. Likewise the public does not like liars; we will not forget your public statement to the Daily Herald in July that the public reprimand you recieved last year is a dead issue because you were "cleared twice of any wrong doing". If you were cleared twice of any wrong doing, why in hell did the Wisconsin Supreme Court order you to pay over $12,000 in costs. You are a fool for thinking that the public can be fooled.

Have a Nice Day.

Peter Robinski

Postscript:: People can spot a phony.

I have already gotten feedback from the few people that you met at the County Fair. You left them with the impression that you were royalty and felt soiled by the personal contact. You forget that you do not hold office by "Divine Right" but by the right of the people.

August 22, 1992

Ken Johnson

Damm. I wish I could have been there to see the spectical. I am doing what I can to spread the word all over the county.

Jim Rogers waxed your ass in court Thursday afternoon. He pointed out how you were continually mispresenting the facts and that he "was sick of your lies". This is all a matter of public record. It would appear that you have not changed your stripes. This is consistent with the testimony of 3 judges from Dodge County that they did not find you to be a truthful individual.

HA HA. You have lost one of the few supporters you had.

Than again, I am told that "truth is a defense to slander". If Jim Rogers was wrong in his public statements against you, maybe you should sue him.

Jim Rogers calling you a liar in open court was very entertaining, but what had the spectators really rolling in the isles was your question the defendant about whether HE ever took ethics courses in college. You really are a sociopath.

Trusting that this meets with your approval, I remain

Very truly yours,

Marie Conley

cc THE WORLD

DISTRICT ATTORNEY KEN JOHNSON HAD GIVEN ME ORIGINAL LETTERS FROM THE PAUL GOETZ LAW OFFICE DATED NOVEMBER 7, 1992; MAY 8, 1992;JULY 21, 1992 AND JULY 24, 1992 WHICH HE HAD RECEIVED AT HIS OFFICE IN THE LINCOLN COUNTY COURT HOUSE. THESE LETTERS PERTAINED TO A DISPUTE BETWEEN THE DISTRICT ATTORNEYS OFFICE AND PAUL GOETZ OVER A SPEEDING TICKET WHICH MR. GOETZ HAD RECEIVED IN LINCOLN COUNTY.

ON SEPTEMBER 21,1993 I MAILED THE MATERIALS WITH THE QUESTIONED TYPEWRITING IMPRESSIONS AND THE MATERIALS KNOWN TO HAVE CAME FROM THE LAW OFFICE OF PAUL GOETZ TO THE WISCONSIN STATE CRIME LABORATORY IN MADISON. I SUBSEQUENTLY RECEIVED A REPLY FROM THE STATE CRIME LABORATORY DATED OCTOBER 14,1992. THE CRIME LAB HAD BEEN UNABLE TO FIND ANY LATENT FINGER AND OR PALM PRINTS ON THE QUESTIONED MATERIALS. AS THE STATE CRIME LAB HAD NO ONE TO EXAMINE THE MATERIALS FOR TYPEWRITTEN IMPRESSIONS AT THAT TIME THEY SUGGESTED I SEND THE MATERIALS TO THE FEDERAL BUREAU OF INVESTIGATION IN WASHINGTON, D.C..

ON NOVEMBER 17,1992 I THEN SENT THE MATERIALS ON TO THE FEDERAL BUREAU OF INVESTIGATION IN WASHINGTON, D.C.. I RECEIVED A REPLY FROM THE FEDERAL BUREAU OF INVESTIGATION DATED FEBRUARY 5,1993. IT HAD BEEN EXAMINED (FBI FILE NO: 95A-HQ-1040614, LAB NO. 21119011 D UD) AND IT WAS DETERMINED THAT THE QUESTIONED EXEMPLARS (THOSE FROM THE LAW OFFICE OF PAUL GOETZ) ORIGINATED FROM THE SAME TYPEWRITING SOURCE.

IN APRIL OF 1993 I LEARNED OF DISPUTE BETWEEN PAUL GOETZ AND POLICE CHIEF GARY MARTEN OF THE WESTON POLICE DEPARTMENT. THIS WAS OVER A PARKING TICKET WHICH MR. PAUL GOETZ HAD RECEIVED. CHIEF MARTEN HAD RECEIVED THREE

LETTERS FROM THE LAW OFFICE OF PAUL M. GOETZ, 324 1/2 WASHINGTON STREET., POST OFFICE BOX 6016 KRYSHAK BUILDING WAUSAU, WIS., 54402. ALL THREE OF THESE LETTERS WERE SIGNED BY PAUL GOETZ. ON APRIL 16,1993 I OBTAINED THE ORIGINAL LETTERS FROM CHIEF OF POLICE GARY MARTEN.

ON APRIL 20,1993 I SENT THESE NEW KNEW EXEMPLARS SIGNED BY PAUL GOETZ AND THE ITEMS PREVIOUSLY SENT TO THE FEDERAL BUREAU OF INVESTIGATION IN WASHINGTON, D.C. BACK TO THE DOCUMENT SECTION OF THE FEDERAL BUREAU OF INVESTIGATION. I REQUESTED THAT THE TYPEWRITING IMPRESSIONS ON THESE THREE KNEW EXMPLARS BE COMPARED TO THE ONES ON THE PREVIOUSLY EXAMINED DOCUMENTS.

I RECEIVED A RESPONSE FROM THE FEDERAL BUREAU OF INVESTIGATION DATED AUGUST 11,1993 IN RESPONSE TO THE COMMUNICATION DATED APRIL 20,1993. IT WAS DETERMINED THAT THE QUESTIONED TYPEWRITER IMPRESSIONS ON THE EXMPLARS SUBMITTED ON APRIL 20,1992 ORIGINATED FROM THE SAME TYPEWRITING SOURCE AS THE EXMPLARS SUBMITTED ON NOVEMBER 17,1992 TO THE FEDERAL BUREAU OF INVESTIGATION.

I ALSO HAVE A LETTER FROM MR. TOM BERGER; OPINION EDITOR, OF THE WAUSAU DAILY HERALD STATING THAT ON TWO OCCASIONS PRIOR TO THE NOVEMBER 1992 ELECTIONS THE DAILY HERALD HAD RECEIVED LETTERS TO THE EDITOR FROM A WRITER WHO PURPORTED TO BE A MARIE CONLEY ALLEGING MISCONDUCT ON THE PART OF LINCOLN COUNTY DISTRICT ATTORNEY. HE WAS NOT SURE WHEN I SPOKE TO HIM BUT THOUGHT THAT AT ONE TIME A WOMAN WHO IDENTIFIED HERSELF AS MARIE CONLEY CALLED AND ASKED WHY HER LETTER HAD NOT BEN PUBLISHED.

AT THIS TIME I HAVE NO MORE INFORMATION AND REQUEST YOU OPINION BEFORE I PROCEED. AS

PREVIOUSLY INSTRUCTED BY KEN JOHNSON IF A MATCH DID OCCUR ON THE EXMPLARS MY NEXT STEP WOULD BE TO GO TO THE JUDGE AND REQUEST A SPECIAL PROSECUTOR.

RESPECTFULLY SUBMITTED

s/Sgt. Ronald W. Hirte
Det. SGT. Ronald W. Hirte
LINCOLN COUNTY SHERIFF'S DEPT.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatte L. Bridge
Deputy Attorney General

Division Of Criminal Investigation
Frank A. Meyers, Administrator
123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857
608/266-1671

December 9, 1993

Mr. Harvey Woodward, Sheriff
Lincoln County Sheriff's Department
1104 East First Street
Merrill, Wisconsin 54452

Dear Sheriff Woodward:

In September of 1993, you sent a package requesting an investigative review of information that your detectives developed during their investigation of an election situation in your county. Subsequently, we were in contact with you and requested further information to include copies of the correspondences that were sent and analyzed in this instance. Those were received in October of 1993 from your Sergeant Ronald W. Hirte.

Since that time, I have asked staff in our White Collar Crimes Bureau to review the information and documents and, as a result of that review, we do not see anything further that needs to be done from an investigative standpoint. We further feel that the matter is not something that we would consider forwarding to a prosecutor.

Sincerely,
s/Frank A. Meyers
Frank A. Meyers, Administrator
Division of Criminal Investigation

kl

Law Office Of
Paul M. Goetz
324½ Washington Street
P.O. Box 6016
Kryshak Building
Wausau, Wisconsin 54402

June 7, 1995

Telephone
715-848-3358

Paul Payant
Attorney at Law
Post Office Box 308
Antigo, Wisconsin 54409-0308

Re: Kenneth N. Johnson-BAPR Matters

Dear Mr. Payant:

I would like to see the complaints against me dismissed, on the law, rather than on the facts. I understand that your role is that of an investigator; presumedly that is why YOU HAVE NOT ACKNOWLEDGED MY LETTERS OF MAY 1, 1995, May 15, 1995 and May 30, 1995. I continue to challenge the constitutionally of the "offensive personality" provision of the attorney's oath AS APPLIED to the facts alleged against me.

I do not take this investigation personally. When I was District Attorney I would always refer to Public Defender Jim Lex as "BROTHER LEX". We were professional adversaries, not mortal enemies (although I am told that former District Attorney Johnson did not have that same type of relationship with the defense bar. I do not know you or the other members of the District 16 Committee well at all. I have to assume that, as professionals none of you will prejudge me or any so called factual issues simply because I continue to insist on addressing the legal issues first.

When i was elected District Attorney in 1992, one of the first things I did was to attend a week long seminar for new District

Attorneys. Milwaukee County District Attorney E. Michael McCann taught the course entitled ETHICS FOR PROSECUTORS. I was taught not to file criminal charges unless I believed, up front, from day one, that I could prove my case at trial beyond a reasonable doubt. It was not enough that I had probable cause for a bindover. If I had any uncertainties I would look at the jury instructions on the crime to see if the facts I had (disputed or not) applied to the law. If I had a precharging conference with a defense attorney where I might be supplied with additional law, as a matter of ethics I would have to at least look at the legal arguments with an open mind before I decided whether o or not to go forward with a prosecution. I have been asking you to do the same thing.

As I understand it, the only dispositive factual issue (assuming these matters cannot be dismissed on the law) is how much, if anything did I have to do with the disputed letters. I do not want to sound melodramatic but if this matter must be decided on the facts and not on the law, and, if there is a God, there will be a finding of insufficient evidence. So far the forces of evil have prevailed. I have been through hell and it is not over with yet.

I am being firm on my position that this matter should be decided on the law and not the facts because a factual finding of insufficient proof does me no good what so ever. SUCH A FINDING WILL DO NOTHING TO "UNRING THE BELL" that Johnson set in motion with his statement to the tabloid Wausau Daily Herald that I was the subject of a "criminal investigation". SUCH A FINDING WILL DO NOTHING TO "UNRING THE BELL" when Special Prosecutor Zakowski PUBLICLY CALLED ME DISHONEST. SUCH A FINDING WILL DO NOTHING TO UNRING THE BELL for Special Prosecutor Zakowski's wrongful conclusions, in his report to Judge Fox that I was responsible for the letters that, because they are disputed, continue to be the focus of your investigation. SUCH A FINDING WILL DO NOTHING TO "UNRING THE BELL" when, because Judge Fox did not take adequate steps to keep the Special Prosecutor's report confidential, the Wausau Daily Herald had a front page story in September

1994 about the Special Prosecutor calling for an ethics investigation, that I was dishonest and that I was responsible for the disputed letters. SUCH A FINDING WILL DO NOTHING TO "UNRING THE BELL" in September 1994 when the Rhinelander Daily News had a front page headline of "DA DISHONEST SAY SPECIAL PROSECUTOR', and again reported the contents of his report that I was "DISHONEST" and that I was responsible for all of the disputed letters. SUCH A FINDING WILL DO NOTHING TO "UNRING THE BELL" of the tabloid Wausau Daily Herald's sensationalism in their coverage of these matters, reporting only "ten percent" of the facts, much like the National Enquirer reports Its stories, editorizing within its stories, and then on its editorial pages, first calling for me to resign, then calling for the people of Lincoln County to find someone to run against me, and finally totally ignoring my opponent's professional shortcomings when they endorsed him in over me in the 1994 election. SUCH A FINDING WILL DO NOTHING TO "UNRING THE BELL" when the Herald decided, as a matter of policy that they could sell newspapers by taking the "high road" against a "dishonest" public official and report anything and everything that had anything to do with the District Attorney's office, tabloid style (printing only part of the facts and leaving out all the facts that would neutralize a story or make me look good.) THIS CHRONIC 'BELL RINGING' BY THE HERALD included, but was not limited to the Herald's coverage of my difficulties with an insubordinate employee, the Victim Witness Coordinator, and the tabloid Herald giving me a public image of being DISHONEST, AND SLEAZY, BUT IF THAT WAS NOT ENOUGH, I WAS ALSO A DISTRICT ATTORNEY WHO WAS "ANTI-VICTIM".

I WOULD SAY THAT IT IS HIGH TIME THAT BAPR REALIZES WHO THE VICTIM WAS IN THIS CASE. I WAS THE VICTIM, NOT JOHNSON. I SUBMIT THAT JOHNSON KNEW THAT THE TABLOID HERALD WOULD ACT AS HIS "AGENT EVEN IF HE MAY NOT HAVE KNOWN TO WHAT DEGREE THE HERALD, (which was supposedly reporting on my "lack of ethics") would to in their efforts to sell their RAG.

Again, assuming there is a God and good will triumph over evil, a factual finding of insufficient proof WILL DO NOTHING TO PREVENT A SIMILAR THING FROM HAPPENING TO ANOTHER ATTORNEY, EVEN BY ACCIDENT OR NO FAULT OF HIS OWN.

A STATE IS WITHOUT POWER TO IMPOSE AN UNCONSTITUTIONAL REQUIREMENT FOR THE GRANTING OF A PRIVILEGE

I understand that the practice o law is a "privilege" and not a "right". The state has police powers to regulate the practice of law for the good of the public. This distinction between a "privilege" and a "right", however, does not give States license to set up Constitutional barriers to the granting of the "privilege" practicing law up admission to the bar or to set up constitutional barriers upon penalty of discipline or loss of the "privilege". The State cannot penalize ANYONE for exercising a right guaranteed by the Constitution. It cannot withhold or limit a "privilege" as a penalty for the exercise of a Constitutional right.

This principle was first noted almost 70 years ago when Mr. Justice Sutherland, writing for the UNITED STATES SUPREME COURT in FROST & FROST TRUCKING COMPANY v. RAILROAD COMM'N 271 U.S. 583, 593-594, 46 S.CT. 605, 607, 70 L. Ed 1101(1926) made the following observation, which is a true now as is was then:

> "It would be a palpable incongruity to strike down an act of state legislation which, by words or express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same is accomplished under the guise of a surrender of a right in exchange for a a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant grant it upon such conditions as it sees fit to impose. But the

> power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may in like manner, compel the surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

In THORP v. HOUSING AUTHORITY OF CITY OF DURHAM 386 U.S. 670 87 S.CT. 1244 (1967) the UNITED STATES SUPREME COURT held that the recieptient of a government benefit, be it a tax exemption, public employment, A LICENSE TO PRACTICE LAW, or a home in a public housing project. cannot be made to forfeit the benefit because he exercises a constitutional right. (citations omitted). In UNITED STATES v. CHICAGO, M.ST.P&P. R.CO. 282 U.S. 311, 328-329, 51 S.CT. 159, 163-164, 75 L Ed 359, the high court said:

> "The right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal constitution....In Speiser v. Randall, supra, at 518, 78 S.Ct. at 1338, we recognized that 'To deny an exemption to claimants who engage in certain forms of speech is in effect to penalive them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech.'

SMITH v. ALLWRIGHT 321 U.S. 664, 64 S.Ct 757 noted that:

> "Constitutional rights would be of little value if they could be...indirectly denied"

Gomillion v. Lightfoot 364 U.S. 339, 345, 81 S.Ct. 125, 129, 5 L Ed 2d 110 noted:

> "....or manipulated out of existence."

This Wisconsin case of PEPPIES COURTESY CAB CO. v. CITY OF KENOSHA 165 Wis. 2d 397, 475 NW 2d 156 (1991) involved a constitutional challenge to a city ordinance designed to regulate cab drivers and their dress and grooming. The city claimed th ordinance was enacted to further the government interest in "cleaning up the city." Several federal grooming cases were cited as having failed to determine that the right to freedom of appearance was a "fundamental right", so the Wisconsin Supreme Court applied the "rational basis test" (rather than the "compelling interest test") to determine if the ordinance could pass constitutional muster.

The Wisconsin Supreme Court held that the Kenosha ordinance violated the cab drivers' rights to DUE PROCESS AND LIBERTY UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION and similar provisions under the Wisconsin Constitution. The court noted that while the city was to be commended for its desire to improve the image of the City, THE CODE WAS ADOPTED ONLY ON THE BASIS OF SUBJECTIVE COMPLAINTS of the police department and its officials. There were no studies conducted which showed the cab drivers were responsible for the tarnished image of the city. The Court further held that WITHOUT EXTRINSIC EVIDENCE SHOWING A NEGATIVE EFFECT OF THE CAB DRIVER'S APPEARANCE ON THE VISITOR'S OPINIONS OF THE QUALITY OF LIFE IN THE CITY---THE CODE LACKED SUBSTANTIAL JUSTIFICATION FOR REGULATING DRIVER APPEARANCE.

Freedom of speech is not absolute. One cannot yell "FIRE" in a crowded theater when there is no fire. The government may regulate or punish "fighting words" as long as it does not regulate

their content. There was no suggestion in the HUSTLER MAGAZINE case that the words conveyed by the parody on Rev. Farwell were "fighting words". In HUSTLER, the UNITED STATES SUPREME COURT rejected an "outrageous" standard, and in BOOS v. BERRY 485 U.S. 312, 99 L Ed 2d 333, 108 S. Ct. 1157 (1988) it rejected a "dignity" standard. The "dignity" standard, like the "outrageous" standard was so inherently subjective that it would be inconsistent with the high court's "long standing refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience."

Government may regulate expressive conduct where there is an important government interest AND the regulation is NARROWLY TAILORED TO ADDRESS THAT INTEREST, as in UNITED STATES v. O'BRIAN 391 U.S 367, 276 (1968). O'BRIAN upheld a NARROWLY DRAWN federal statute which SPECIFICALLY PROHIBITED the burning of draft cards.

Government may regulate nonverbal expressive activities because of the action it entails, but not because of ideas it expresses; for example, it may punish flag burning if the burning is in violation of an ordnance against outdoor fires---but it may not punish flag burning as a violation of an ordinance dishonoring the flag.

The First Amendment prevents the government from prohibiting speech, or even expressive conduct because of the disapproval of the ideas expressed. "Content-based" regulations are presumptively invalid. Government may regulate speech if it is "content neutral" and if it is justified without reference to the content of the regulated speech. In other words speech or expressive conduct can be regulated if the regulation is aimed at "secondary effects" such as noted in RENTON v. PLAYTIME THEATERS 475 U.S. 41, 106 S.Ct. 925, 89 L. Ed. 2d 29 (1986). In RENTON he regulation of the content of films being shown at theaters was aimed at the "secondary effects" of such theaters in the surrounding community such as prevention of crime, maintenance of property values, and protection of neighborhoods. LISTENERS REACTIONS TO SPEECH ARE NOT THE TYPE

OF "SECONDARY EFFECTS" REFEREED TO IN RENTON. See BOOS v. BARRY 485 U.S. 312, 108 S. Ct. 1157, 99 L Ed 2d 333 (1988). THE EMOTIVE IMPACT OF SPEECH ON ITS AUDIENCE IS NOT A "SECONDARY EFFECT". A regulation of speech due to its potential impact must be considered CONTENT BASED.

I submit that the "offensive personality" provision of the attorney's oath IS NOT HARROWLY TAILORED TO ADDRESS EXPRESSIVE CONDUCT". It may not be used to regulate the content of speech on some vague and subjective "dignity" or "outrageous" standard; likewise it may not be used to regulate speech on some vague and subjective "offensive" standard. The alleged emotive impact on the audience that the disputed letters MAY have brought "DISREPUTE" upon myself and the profession is irrelevant; the State, not even the State Bar or the State Supreme Court can regulate speech unless it the regulation is "content neutral". The alleged and unproven "disperpute" does not qualify as a "secondary effect".

In addition, there is NO EXTRINSIC EVIDENCE showing that the disputed letters (allegedly authored and/or mailed by one attorney to a political opponent) standing alone, "CAST DOUBT", LET ALONE CONSTITUTE PROOF that such an attorney would be MORALLY UNFIT to practice law. The lack of EXTRINSIC EVIDENCE (and I maintain that this extrinsic evidence should have predated the alleged wrongdoing) means that there can be no showing of a COMPELLING STATE INTEREST and no conformity with the requirements of DUE PROCESS.

FINALLY, since the disputed letters alleged to have been addressed to or about a public official, they were matters of "political expression" and thus given further First Amendment protection under the McINTYRE case just decided April 19, 1995.

I will call you next week (and if you are not in, I will find out from your secretary when you will be in) so that we can discuss your obligation to review the legal arguments I have presented and to

set up a time for an in person meeting if necessary. I have given you more than law in my "heretofore unacknowledged" Letters to you; I HAVE GIVEN YOU FACTS THAT SHOULD MAKE YOU RECOGNIZE WHO THE REAL VICTIM IN THIS MATTER HAS BEEN. ME.

Very truly yours,
s/Paul M. Goetz
Paul M. Goetz

cc C. Duane Patterson